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NOTICE OF APPEAL.

Filed February 19, 1926.

New Jersey Supreme Court

WILLIAM P. RYAN, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, *Plaintiff*, *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant.*	*Action at Law.*

To Messrs. Grosken & Moriarty, attorneys of plaintiff.

SIRS:

TAKE NOTICE that the defendant, Public Service Railway Company, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-entitled cause.

Dated, February 13, 1926.

Yours truly,

JOSEPH COULT,
Attorney of Defendant.

(Endorsed:) "Service of a copy of the within notice is hereby acknowledged this 17th day of Feb., 1926. Grosken & Moriarty, Attorneys of Plaintiff."

NOTICE OF APPEAL.

Filed February 19, 1926.

NEW JERSEY SUPREME COURT.

WILLIAM P. RYAN, administrator of the estate of M. E. Gertrude Ryan, deceased, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant.*	*Action at Law.*

To Messrs. Grosken & Moriarty, attorneys of plaintiff.

SIRS:

TAKE NOTICE that the defendant, Public Service Railway Company, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-entitled cause.

Dated, February 13, 1926.

Yours truly,

JOSEPH COULT,
Attorney of Defendant.

(Endorsed:) "Service of a copy of the within notice is hereby acknowledged this 17th day of Feb., 1926. Grosken & Moriarty, Attorneys of Plaintiff."

SUMMONS AND COMPLAINT.

The defendant was duly summoned.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WILLIAM P. RYAN, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, *Plaintiff*, *vs.* PUBLIC SERVICE RAILWAY COMPANY, a corporation, *Defendant*.	*Action at Law.* *Complaint.*

The plaintiff, residing at No. 55 Richelieu Place, Newark, New Jersey, says that:

1. He is the administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased; that letters of administration *ad prosequendum* were granted to him on the twenty-fifth day of November, 1924, by the Surrogate of the County of Essex, New Jersey, which letters he here and now brings into court.

2. On January 16, 1924, the defendant, Public Service Railway Company, was, and still is, a corporation and operated a trolley railroad in the City of Newark by running cars, propelled by electricity over rails laid upon the public streets in the City of Newark, and was at that time and still is a common carrier of passengers by said trolley railroad.

3. On said day the said defendant, by its agents and servants, operated and ran one of its said cars, propelled by electricity, as aforesaid, in and along Market street, a public street in said city, and caused same to be brought to a stop therein at or near Washington street, and opened the doors at the rear end of said car for the purpose of receiving passengers on said car.

4. On said day, while said car was so stopped at said place and while said doors were open, as aforesaid, the said M. E. Gertrude Ryan, now deceased, boarded said car at the rear end thereof, at the special instance and request of the defendant, by its agents and servants, to be safely and securely carried by said defendant in said car upon and along said Market street, for hire and reward to be paid by the said M. E. Gertrude Ryan, now deceased, to the said defendant, and the said M. E. Gertrude Ryan, now deceased, then and there became and was a passenger for hire on said car of said defendant.

5. On said day and at said place, while the said M. E. Gertrude Ryan, now deceased, was so a passenger on said car and standing at the rear end thereof, the defendant, by its agents and servants, then and there carelessly, improperly, negligently and unskillfully managed and operated said car; in that it, by its agents and servants, then and there permitted and allowed the rear end of said car to become and remain overcrowded with a large and excessive number of persons; in that said defendant, by its agents and servants, then and there in permitting and allowing the rear end of said car to become and remain overcrowded as aforesaid, impeded the progress of the said M. E. Gertrude Ryan, now

deceased, toward the body of said car; in that, while said M. E. Gertrude Ryan, now deceased, was so a passenger on said car and standing at the rear end thereof and while the rear end of said car was so overcrowded with a large and excessive number of persons and while the progress of the said M. E. Gertrude Ryan, now deceased, toward the body of the said car was so impeded, said defendant, by its agents and servants, then and there started said car in motion and ran and operated the same in a westerly direction in and along said Market street, without first affording the said M. E. Gertrude Ryan, now deceased, an opportunity to reach a place of safety; in that while so starting, running and operating said car as aforesaid, said defendant, by its agents and servants, then and there allowed said doors at the rear end of said car to remain open; in that the defendant, its agents and servants, then and there, before so starting, running and operating said car as aforesaid, did not afford the said M. E. Gertrude Ryan, now deceased, an opportunity to reach a place of safety; and in that the defendant, its agents and servants, then and there, before so starting, running and operating said car as aforesaid, did not provide proper safeguards or make adequate provision for the safety and security of the said M. E. Gertrude Ryan, now deceased.

6. By reason of said carelessness, negligence, unskillfulness and misconduct of the said defendant, by its agents and servants, the said M. E. Gertrude Ryan, now deceased, was forced and thrown from said car to the pavement on said Market street.

7. Whereby the said M. E. Gertrude Ryan, now deceased, was severely injured about the head, limbs and body, her brain and nervous system were severely injured and shocked and she then and there sustained other painful and permanent injuries.

8. Because of the negligence above stated and as a result of the injuries so sustained by her, the said M. E. Gertrude Ryan died on the 12th day of June, 1924.

9. The said M. E. Gertrude Ryan was thirty-four years old at the time of her death, was then engaged as an assistant buyer and saleswoman in the store of L. Bamberger & Co., Newark, New Jersey, and left her surviving as her next of kin her sister, Julia T. Ryan; her brother, William P. Ryan; her sister of the half-blood, Mary A. Smith, and her brother of the half-blood, Joseph H. Jarvis, who have suffered pecuniary injury because of her death.

10. Plaintiff's action against said defendant was commenced within two years after the death of the said M. E. Gertrude Ryan.

Plaintiff demands twenty-five thousand ($25,000) dollars damages.

GROSKEN & MORIARTY,
Attorneys for Plaintiff.

Answer—William P. Ryan, admr. ad pros.

ANSWER.

Filed March 8, 1925.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, in answer to the plaintiff's complaint, says that:

1. As to the allegations contained in paragraphs 1 and 10 of the complaint, it has no knowledge or information thereof sufficient to form a belief.

2. It admits the allegations contained in paragraph 2 of the complaint.

3. It denies the allegations contained in the remaining paragraphs of the complaint.

FIRST DEFENSE.

1. It avers that the negligence of M. E. Gertrude Ryan contributed to the happening of the said alleged accident.

SECOND DEFENSE.

1. It avers that the said William P. Ryan, as administrator of the estate of the said M. E. Gertrude Ryan, has a cause of action pending and undetermined for the same alleged accident in this court.

JOSEPH COULT,
Attorney of Defendant.

REPLY.

Filed March 27, 1925.

The plaintiff, William P. Ryan, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, residing at No. 55 Richelieu Place, Newark, New Jersey, replying to the answer of the defendant, Public Service Railway Company, a corporation, says that:

1. He denies the allegations contained in the first defense of said answer.

2. He denies the allegations contained in the second defense of said answer.

GROSKEN & MORIARTY,
Attorneys for Plaintiff.

JUDGMENT.

This cause was tried before Circuit Court Judge Worrall F. Mountain, to whom said cause had been duly referred for trial by an order of the Chief Justice of the State of New Jersey with a jury at the Essex Circuit, on February 4th and 5th, 1926.

The jury rendered a verdict in favor of the plaintiff, William P. Ryan, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, and against the defendant, Public Service Railway Company, a corporation, in the sum of four thousand five hundred ($4,500) dollars.

$4,500.00

Whereupon it is adjudged that the plaintiff, William P. Ryan, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, do recover of the said defendant, Public Service Railway Company, a corporation, the sum of four thousand five hundred dollars damages, together with his costs, which have been taxed at the sum of
making in the whole the sum of

Judgment entered February 18, 1926.

CERTIFICATE.

A certificate of Edward J. Kelleher, Clerk of the New Jersey Supreme Court, is annexed to the record as sent to the New Jersey Court of Errors and Appeals for the purpose of this appeal.

SUMMONS AND COMPLAINT.

The defendant was duly summoned.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

WILLIAM P. RYAN, administrator of the estate of M. E. Gertrude Ryan, deceased, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, a corporation, *Defendant.*	*Action at Law.*

The plaintiff, residing at No. 55 Richelieu Place, Newark, New Jersey, says that:

1. He is the administrator of the estate of M. E. Gertrude Ryan, deceased; that letters of administration were granted to him on the twenty-sixth day of June, 1924, by the Surrogate of the County of Essex, New Jersey, which letters he here and now brings into court.

2. On January 16, 1924, the defendant, Public Service Railway Company, was, and still is, a corporation and operated a trolley railroad in the City of Newark by running cars, propelled by electricity over rails laid upon the public streets in the City of Newark, and was at that time and still is a common carrier of passengers by said trolley railroad.

3. On said day the said defendant, by its agents and servants, operated and ran one of its said cars, propelled by electricity, as aforesaid, in and along Market street, a public street in said city, and caused same to be brought to a stop therein at or near Washington street, and opened the doors at the rear end of said car for the purpose of receiving passengers on said car.

4. On said day, while said car was so stopped at said place and while said doors were open, as aforesaid, the said M. E. Gertrude Ryan, now deceased, boarded said car at the rear end thereof, at the special instance and request of the defendant, by its agents and servants, to be safely and securely carried by said defendant in said car upon and along said Market street, for hire and reward to be paid by the said M. E. Gertrude Ryan, now deceased, to the said defendant, and the said M. E. Gertrude Ryan, now deceased, then and there became and was a passenger for hire on said car of said defendant.

5. On said day and at said place, while the said M. E. Gertrude Ryan, now deceased, was so a passenger on said car and standing at the rear end thereof, the defendant, by its agents and servants, then and there carelessly, improperly, negligently and unskillfully managed and operated said car; in that it, by its agents and servants, then and there permitted and allowed the rear end of said car to become and remain overcrowded with a large and excessive number of persons; in that said defendant, by its agents and servants, then and there, in permitting and allowing the rear end of said car to become and remain overcrowded as aforesaid, impeded the

progress of the said M. E. Gertrude Ryan, now deceased, toward the body of said car; in that, while said M. E. Gertrude Ryan, now deceased, was so a passenger on said car and standing at the rear end thereof and while the rear end of said car was so overcrowded with a large and excessive number of persons and while the progress of the said M. E. Gertrude Ryan, now deceased, toward the body of the said car was so impeded, said defendant, by its agents and servants, then and there started said car in motion and ran and operated the same in a westerly direction in and along said Market street, without first affording the said M. E. Gertrude Ryan, now deceased, an opportunity to reach a place of safety; in that while so starting, running and operating said car as aforesaid, said defendant, by its agents and servants, then and there allowed said doors at the rear end of said car to remain open; in that the defendant, its agents and servants, then and there, before so starting, running and operating said car as aforesaid, did not afford the said M. E. Gertrude Ryan, now deceased, an opportunity to reach a place of safety; and in that the defendant, its agents and servants, then and there, before so starting, running and operating said car as aforesaid, did not provide proper safeguards or make adequate provision for the safety and security of the said M. E. Gertrude Ryan, now deceased.

6. By reason of said carelessness, negligence, unskillfulness and misconduct of the said defendant, by its agents and servants, the said M. E. Gertrude Ryan, now deceased, was forced and thrown from said car to the pavement on said Market street.

7. Whereby the said M. E. Gertrude Ryan, now deceased, was severely injured about the head, limbs and body, her brain and nervous system were severely injured and shocked and she then and there sustained other painful and permanent injuries.

8. The said M. E. Gertrude Ryan, now deceased, was then engaged as an assistant buyer and saleswoman in the store of L. Bamberger & Co., Newark, New Jersey, and, by reason of said injuries, as aforesaid, she was unable to attend to her business for a long time, whereby she lost large sums of money.

9. By reason of said injuries the said M. E. Gertrude Ryan, now deceased, suffered and underwent great pain and was permanently disabled and hindered and prevented for a long time from attending to her business and thereby lost her earnings for a long time and expended large sums of money for medical and surgical attendance, nurse's attendance and medicine because of said injuries.

Plaintiff demands twenty-five thousand ($25,000) dollars damages.

GROSKEN & MORIARTY,
Attorneys for Plaintiff.

ANSWER.

Filed March 8, 1925.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, in answer to the plaintiff's complaint, says that:

1. In answer to paragraph 1 of the complaint, it has no knowledge or information thereof sufficient to form a belief.

2. It admits the allegations contained in paragraph 2 of the complaint.

3. It denies the allegations contained in the remaining paragraphs of the complaint.

OBJECTIONS.

1. It avers that the complaint does not specify extent or duration of disability.

2. It avers that the complaint fails to set forth facts sufficient to constitute a cause of action in the plaintiff against the defendant, and it reserves the right to move to strike out the said complaint at the trial of this suit.

FIRST DEFENSE.

1. It avers that the negligence of M. E. Gertrude Ryan contributed to the happening of the said alleged accident.

JOSEPH COULT,
Attorney of Defendant.

REPLY.

Filed March 27, 1925.

The plaintiff, William P. Ryan, administrator of the estate of M. E. Gertrude Ryan, deceased, residing at No. 55 Richelieu Place, Newark, N. J., replying to the answer of the defendant, Public Service Railway Company, a corporation, says that:

1. He denies the allegations contained in the first defense of said answer.

GROSKEN & MORIARTY,
Attorneys for Plaintiff.

JUDGMENT.

This cause was tried before Circuit Court Judge Worrall F. Mountain, to whom said cause had been duly referred to for trial by an order of the Chief Justice of the State of New Jersey with a jury at the Essex Circuit, on February 4 and 5, 1926.

The jury rendered a verdict in favor of the plaintiff, William P. Ryan, administrator of the estate of M. E. Gertrude Ryan, deceased, and against the defendant, Public Service Railway Company, a corporation, in the sum of three thousand five hundred and eighty-eight ($3,588.00) dollars.

$3,588.00

Whereupon it is adjudged that the plaintiff, William P. Ryan, administrator of the estate of M. E. Gertrude Ryan, deceased, do recover of the said defendant, Public Service Railway Company, a corporation, the sum of three thousand five hundred and eighty-eight dollars damages, together with his costs, which have been taxed at the sum of

making in the whole the sum of

Judgment entered February 18, 1926.

CERTIFICATE.

A certificate of Edward J. Kelleher, Clerk of the New Jersey Supreme Court, is annexed to the record as sent to the New Jersey Court of Errors and Appeals for the purpose of this appeal.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM P. RYAN, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, *Plaintiff*, *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant.*	*Action at Law.*
WILLIAM P. RYAN, administrator of the estate of M. E. Gertrude Ryan, deceased, *Plaintiff*, *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant.*	*Action at Law.* *Stipulation.*

IT IS HEREBY STIPULATED and agreed by and between Grosken & Moriarty, attorneys of the plaintiffs, and Joseph Coult, attorney of the defendant, in the above-entitled actions, that in the appeals in the above-entitled actions to the New Jersey Court of Errors and Appeals said two actions may be printed together in one printed state of the case, which shall include the pleadings in both of said actions, and the evidence taken at the trial at the Essex Circuit of the New Jersey Supreme Court where said

Stipulation.

actions were tried together; AND IT IS FURTHER STIPULATED and agreed that in the said appeals the said two actions may be joined in the same brief for both parties; AND IT IS FURTHER STIPULATED and agreed that the plaintiffs waive the requirement for the giving of appeal bonds by the defendant in both of said actions.

Dated, February 23, 1926.

GROSKEN & MORIARTY,
Attorneys of Plaintiff.

JOSEPH COULT,
Attorney of Defendant.

Opening.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Thursday, February 4, 1926.

WILLIAM P. RYAN, admr. of the estate of M. E. Gertrude Ryan, deceased,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a corporation,
Defendant,

and

WILLIAM P. RYAN, admr. *ad prosequendum* of M. E. Gertrude Ryan,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a corporation,
Defendant.

Action at Law.

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appear Grosken & Moriarty (by Edmund C. Moriarty and Wilbur A. Heisley).

For the defendant appears Henry H. Fryling.

Mr. Heisley: If your Honor please, there are two cases, one is No. 196 on the list and the

other does not appear to be listed, and Mr. Fryling and I have agreed to try the two cases with the same jury.

The Court: One is the administrator and one is the administrator *ad prosequendum?*

Mr. Heisley: Yes. One suit is to recover damages prior to the death of the deceased and we have agreed to try the cases by the same jury, and I think the jury should be sworn in each case, but as to challenges, whether we will have six in each case or whether we agree to have six on each side—

The Court: I am perfectly willing to give you six in each case. You are really trying two cases.

Mr. Fryling: I have no objection to getting all I can, but I do not think I will have to use them.

Mr. Heisley opens for the plaintiff.

Mr. Fryling opens for the defendant.

Mr. Heisley: It is admitted on the record that plaintiff contends, that the plaintiff claims that this death resulted from this accident. Mr. Fryling does not mean to say that it is admitted on his part, but it is claimed by the plaintiff that the death is due to this accident.

Mr. Fryling: That is true.

Mr. Heisley: If your Honor please, I understand that Mr. Fryling admits in the year 1923, beginning with February first, that is the fiscal year in Bamberger's, down to January 26th, 1924, Miss Ryan earned at Bamberger's $829.61, and it is true we have made a general agreement that her earnings were seventy-five dollars per month. It is also admitted that she began work-

ing there in 1915, and during the year 1923 she was absent from her employment only one-half day, and that was in the month of April. In 1921 she went out on October 3rd to December 20th, and on December 20th she went out but returned January 2, 1922. In 1922 she was out from January 20th to February 14th. With respect to other matters she was present every day, as far as the record shows.

ROBERT C. POTTER, sworn in behalf of plaintiff.

Direct examination by Mr. Moriarty.

Q You are a practicing physician? A Yes, sir.

Q And surgeon of this State, practicing in Newark? A In Newark.

Q Where is your office? A 25 Fulton street.

Q With what hospitals are you connected? A St. Mary's.

Mr. Fryling: We admit the doctor's qualifications.

Q Do you specialize in any particular branch? A Eye and ear.

Q Did you, at any time after January 16, 1924, examine M. E. Gertrude Ryan? A I did.

Q For what complaint? A She came to see if I could do anything for her ears. She wanted an examination of her ears and wanted to find out what was the matter with her ears, if I could do her any good.

Q When was this? A The 4th of March, 1924.

Q What did she complain of at that time? A Deafness in the right ear and noises in the head.

Q Did she give you any history? A She gave me a history of having sustained an accident several months prior.

Q To what part of her? A To her head.

Q What did you find on examining her? A I found she was almost totally deaf in the right ear.

Q Did you treat her after that? A No; I never saw her again.

Q Did you recommend any treatments? A I told her I didn't think I could do her any good and I wouldn't take her money.

Q What was your charge? A I charged her three dollars, if I remember correctly.

Q Can you say whether the condition you found in Miss Ryan's ear could have been caused by trauma?

Mr. Fryling: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q What, in your opinion, was the cause of the condition you found?

Mr. Fryling: May I examine the doctor at this time as to the basis of his opinion, if he formed one?

The Court: I thought you admitted his qualifications?

Mr. Fryling: I did, as a physician, but as to his qualifications to give an opinion as to an injury I do not admit that at all,

unless it appears that that opinion is based on the proper facts.

The Court: How do we know what the proper facts are?

Mr. Fryling: That is what I want to find out by asking the doctor, to see whether he was in a position to form an opinion as to the cause of the deafness.

The Court: Very well, proceed.

Q (By Mr. Fryling.) Did you form an opinion? A I did.

Q Was that opinion based on information told you by Miss Ryan? A Partly.

Mr. Fryling: I object to the question on the ground it is based on hearsay.

The Court: I understand it was given with the notion of treating.

Q (By Mr. Fryling.) Did you treat her at all? A I did not treat her at all.

The Court: The doctor says he is here to testify as to facts, not opinions.

Q (Question read.)

Mr. Heisley: May I answer that, your Honor?

The Court: I do not want both attorneys to examine the doctor.

Q (By Mr. Moriarty.) Confine yourself to the examination of the ear; what in your opinion caused the condition you found there? A I cannot tell you any opinion without the history

of the case. In taking the history into consideration my opinion was—

Mr. Fryling: You were not asked that.

Q What, in that condition, led you to conclude that any further treatments from you would be unnecessary? A Why, because in cases of nerve deafness in which there has been a history of accidental injury to the skull, as a rule they are incurable, and anyone who takes a patient's money is rather taking it under false pretenses.

Cross examination by Mr. Fryling.

Q There was no evidence that would satisfy you that there was an injury to the skull at that time, outside of any facts you may have been told? A None at all.

HARRY W. ROWITZ, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q Where do you live? A 41 Barclay street, Newark.

Q What is your occupation? A Stock clerk.

Q Where? A Bamberger's.

Q How long have you been there? A Five years.

Q Are you married or single? A No, sir, single.

Q You either saw some of this accident or something immediately after the accident? A Yes, sir.

Q What time of day was it? A Six o'clock.

Q In the afternoon? A No, sir; in the evening.

Q How was the weather? A Well, it was a stormy night; the wind was blowing really hard and raining also.

Q Was it much of a rain? A Pouring, in fact.

Q What did you see of this happening? A Well, I was standing in Bamberger's entrance; the first one from Washington street.

Q On Market street? A Yes, sir. And I was waiting to board a Kinney car that was going west, and when I saw a Kinney car coming and it came to a standstill in front of Bamberger's entrance, I ran out to approach the car, but there was a crowd trying to get on and they were moving very slowly, and I noticed the platform was crowded, and I started back for the entrance to Bamberger's with the idea of waiting for another car.

Q (By the Court.) That Kinney car was going west on Market street before it made a turn? A Yes, sir.

Q It was headed west when it stopped? A Yes, sir.

Q (By Mr. Heisley.) Did you see the car stop? I do not mean after it turned into Washington street, but did you see it stop before that? A The only time it stopped was when I went to board the car; that is the only stop I noticed.

Q What street was it on when it stopped? A On Market street.

Q Did it come to a stop? A Yes, sir.

Q Why didn't you get on it? A Well, as I said before, there was a crowd getting on the car, and being I didn't have an umbrella and the

car was moving very slowly at the time, and being the platform was crowded, I started back for the entrance.

Q By "back to the entrance" I presume you mean to Bamberger's store? A Yes, sir.

Q What next did you see? A Well, as I turned around I noticed—as I turned around the car was going on its way and my attention was paid strictly to the woman laying on the ground near the car tracks.

Q Miss Ryan? A Yes, sir.

Q Where were you when you turned around and saw Miss Ryan laying on the ground? A I was in Bamberger's entrance, standing there.

Q At that time what was the car doing, was it standing still or moving, or just starting or what? A To that question, as I turned around the car had already started and my attention was mainly to the woman laying on the ground.

Q How was the car going, slowly or fast, or how? A To that question I wouldn't say, to that question, because all I was occupied with mainly was with Miss Ryan on the ground, that took my whole attention.

Q Did you notice whether or not there were any doors on the rear of this car and whether they were open or closed? A To that question, I was mainly interested, as I said before, to Miss Ryan; I didn't pay any attention to that matter.

Q You mean to say you do not know whether the doors were open? A The doors were open as it came to a standstill and that was the last I noticed it.

Q Was that before you saw Miss Ryan lying on the street? A Yes, sir.

Q When it came to a standstill? A Yes, sir.

Q Before you saw Miss Ryan laying on the street the doors were open? A Yes, sir.

Q You noticed that? A Absolutely.

Q Are you sure the car came to a stop before Miss Ryan got on it? A Yes, sir, and there was passengers getting on and off also.

Q Was the car stationary at that time when the passengers were getting on and off? A Yes, sir.

Q How far did Miss Ryan lay from the car? A In that question can I—

Q Just answer the questions; do not repeat them. How far was she lying from the car, right alongside of it, or several feet away, or how far? A I would say about a foot and a half or so.

Q What part of the car was she opposite; I mean was she opposite the rear platform or behind the car or where when you saw her lying in the street? A She was at the rear platform.

Q Did you go out to her? A Yes, sir.

Q Was she conscious or unconscious? A She was conscious.

Q Did she say anything? A No, sir.

Q You think she was conscious? A Yes, sir.

Q What did you do then? A Well, as I ran out to pick her up I noticed a chauffeur turn his car around on the car tracks—I believe he must have been heading west—and he immediately stopped and stepped out, and I helped to pick her up and put her in the car.

Q Who was that chauffeur? A I believe at that time he was Mayor Breidenbach's chauffeur.

Q What do you understand is the meaning of consciousness? A Well, in my opinion she was stiff.

Q Suppose I do not know what is going on in this room, what would you say I was, conscious or unconscious? A Well, you are conscious.

Q Now, do not get confused. When you saw this girl lying out in the street and you went over to her, did she know what was going on, or didn't she know what was going on? A She didn't know what was going on.

Q Then, when you said "conscious" awhile ago, did you mean that she did not know what was going on? A When she was lying in the street, absolutely.

Q You said she was conscious. Conscious means that she realized what was going on. Do you mean to say she did not know what was going on? A Absolutely.

Q Then, she was unconscious? A Unconscious, rather.

Q Did you notice any marks upon her, any blood or anything of that kind? A Well—

Q Did you? A Yes, sir.

Q Where were the marks, or the blood? A On the back of her head.

Q Was her hat on her head when she lay there in the street? If you do not know say so. A I am not sure.

Q Do you know where the car finally stopped after you saw Miss Ryan lying on the street?

Mr. Fryling: I object. There is no evidence that the car stopped.

Q Where did the car go, if you know, after you saw Miss Ryan lying on the street? A As far as I know—

Q Only just as to what you know. Do not guess. If you know where the car went tell us. A Headed westbound.

Harry W. Rowitz, direct.

Q How far did you see it go? A It kept going west and I noticed it went around towards the south.

Q Turned around into Washington street? A Yes, sir.

Q How far down Washington street did you see it go? A Branford Place, I believe, was at the exact point I last seen it.

Q What was it doing down there, moving or standing still? A I believe it was standing still.

Q Did it stop anywheres from the time you saw Miss Ryan lying in the street until you saw it down in Branford Place? A Not to my knowledge.

Q Well, now, you two young men picked her up and put her in the automobile, as I understand it? A Yes, sir.

Q I think you took her to the hospital, didn't you? A Yes, sir.

Q Which hospital? A City Hospital.

Q Did you go with her? A Yes, sir.

Q She was unconscious the whole time, or did she regain consciousness? A Near the hospital, I think, she became conscious for a moment or so, because I heard her mention two words.

Q What did she say?

Mr. Fryling: I object to that as hearsay.

Mr. Heisley: That is to show she regained consciousness and uttered an exclamation of pain.

The Court: Sustain the objection.

Q She was taken into the hospital, I suppose? A Yes, sir.

Q Was she carried in or did she walk in? A She was carried in.

Q Who carried her in, if you recall? A The chauffeur and myself.

Q You took her to the first floor, I suppose? A Yes, sir.

Q Is that all you know about it? A Well, then there was a man from headquarters, or whatever precinct, was sent up there, to take my information of what I seen.

Q That is the only connection you had with the case, isn't it? A Yes, sir.

Q During the time you were taking her to the hospital and at the time you got her to the hospital, did you hear her converse, or do anything which indicated she was conscious, except to speak two words. Did she do anything else? A No, sir.

Q When you carried her into the hospital, to your knowledge was she conscious or unconscious? A Can I go a little more than that?

Q Answer my question. Did she know anything or not know anything when you were taking her into the hospital? A No, sir.

Q What do you mean, she did or did not? A Did not know anything.

Q Did you notice any blood on her at that time? A The blood was on my clothes.

Q On what part of your clothes? A My overcoat and my hands.

Q I do not want to lead you, but did she bleed much or little, or how much? A Well, she at that time bled quite freely. It was coming pretty hard at that time when I took her.

Q What was that? A The blood was running pretty freely.

Q Where from? A The back of her head.

Q Do you recall what side or part of her head the blood was running from? A No, sir.

Harry W. Rowitz, cross.

Cross examination by Mr. Fryling.

Q Market street, in front of Bamberger's, at that time of night when the accident happened, was very crowded, wasn't it? A Quite crowded.

Q There were a great many people waiting along Market street to get on trolley cars, weren't there? A I wouldn't say a great many, no.

Q How many would you say, approximately, were waiting to get on the Kinney car? A I would say seven or eight, I guess.

Q Men and women? A Well, that I didn't pay any attention to.

Q You did notice quite a few go out in the street towards the car as the car was coming along? A Yes, sir.

Q There were so many going towards the car, that you wanted to board, that you went back to the entrance to Bamberger's? A I stood still in front of the car being as the people were getting out and being it going so slow, and the back platform was crowded and I didn't have an umbrella, so I started back to the entrance again.

Q Were people getting on both ends or the rear end? A What do you mean by both ends?

Q You say you were standing at the front of the car? A No, sir.

Q Where were you? A At the rear.

Q Were passengers getting on the rear end or both ends? A No, sir, the rear end.

Q There were so many getting on the rear end of the car and the car was so crowded, and they were going so slowly, you went back to the entrance to Bamberger's? A Yes, sir.

Q The car was crowded at that time? A That I couldn't say, because the back platform was crowded.

Q And so far as you know, the inside of the car was crowded? A That I couldn't say.

Q You could not see the inside of the car? A No, sir.

Q The back platform was crowded and there were still people in the street, standing in the rain, crowding onto the car, weren't there? A Yes, sir.

Q And you turned back to Bamberger's? A Yes, sir.

Q Before you turned back to Bamberger's did you see where Miss Ryan was? (Withdraw that.) Did you see Miss Ryan at any time after she left the store and before you saw her lying on the street? A No, sir.

Q As you were waiting to get on the car and as you went out to the car you did not see anything of her? A No, sir.

Q Then, while the people were still getting on the car you went back to the entrance to Bamberger's and then there was something that attracted your attention? A Yes, sir.

Q Someone let out a yell, didn't they? A No, sir.

Q At any rate, somebody called your attention to the fact that there was an accident? A As I went back to the entrance, as I turned around I noticed the Kinney car was continuing on its way and the woman laying on the ground.

Q Without your attention being attracted to anything, you turned around and saw the woman laying on the ground? A Yes, sir.

Q Did you know who it was? A No, sir.

Harry W. Rowitz, cross.

Q You saw a woman lying on the ground? A Yes, sir.

Q At the same time when you saw the trolley car? A Yes, sir.

Q About how far from her was the rear of the trolley car, the extreme rear end of the trolley car, when you turned around and saw this woman lying on the ground? A You mean—

Q When you turned around and saw this woman first lying on the ground, was the trolley car beyond her? A It was going; yes, sir.

Q How far beyond where she was lying was the rear end of the trolley car?

Mr. Heisley: I object. He did not say it was beyond her.

Q Had the trolley car gotten completely beyond where she was lying on the ground, or not, when you first saw the woman lying on the ground? A I don't understand.

Q (Withdraw that question.) Where on the street was the woman lying on the ground when you first saw her? A About a foot and a half or so from the car tracks.

Q Between the curb on the north side of Market street and the nearest rail? A The first rail; yes, sir.

Q That is the first north rail of the westbound track? A Yes, sir.

Q About how far from Washington street was she? A She was right where Bamberger's entrance is, right there.

Q Where was she with respect to the place where the people were getting on the car before you went back to the store? A When I noticed her I didn't know her at all.

Q When you saw the woman lying on the ground, was she anywhere near the place where you had been standing when you were out in the street? A No, sir.

Q Was she further west from where you had been standing? A I don't know.

Q When you saw her lying on the ground? A Her face was kind of west.

Q Where was her whole body with respect to the place where the people had been getting on the car, was it at that place or further west of that? A About that place.

Q Where was the car at that time when you first saw her laying on the ground? A The car was going then at about—say about six feet or so.

Q When you say six feet, what do you mean, the rear end of the car was six feet further west from where she was lying? A Yes, sir.

Q That is when you first saw her lying on the ground? A Yes, sir.

Q Then you ran out into the street immediately? A Yes, sir.

Q When you ran out in the street you recognized her as Miss Ryan? A No, sir.

Q Did you know Miss Ryan before that? A No, sir.

Q You were working in the same store she was? A Yes, sir.

Q You did not know her, though? A No, sir.

Q When you got to her you did not know who she was? A No, sir.

Q You and someone else got ahold of her and carried her in what direction? A Carried her west towards the City Hospital.

Q Did you move her from where she was lying on the ground before you put her in the

automobile? A We lifted her up and his car was lying opposite her.

Q So you put her in the automobile from that position? A Yes, sir.

Q While you were doing that you were not paying any particular attention to the trolley car, were you? A No, sir.

Q Did you watch the trolley car to see where it stopped afterwards, while you were paying attention to the woman? A When we lifted the woman on to the car and started west, when we got to Washington street I looked around and noticed that the last stop was Branford Place.

Q When you ran out into the street your attention was directed to this woman on the ground? A Yes, sir.

Q You were not paying any attention to this trolley car then? A The trolley car was in motion, yes, sir.

Q You did not watch the trolley car then, did you? A I know when I got to the woman the car was about eight feet; more than six feet.

Q I thought that you said when you first saw the woman lying on the ground the trolley car was then six feet beyond her. Is that so or isn't it? A When I saw the woman lying on the ground the car was already gone six feet.

Q Then you ran out to her? A Yes, sir.

Q Then you paid your attention to her, didn't you? A Yes, sir.

Q You were not watching the trolley car then? A No, sir.

Q You put her in the automobile? A Yes, sir.

Q And you got in the automobile, too? A Yes, sir.

Q That went west on Market street, did it? A Yes, sir.

Q When you got to Washington street you looked down and saw the car standing on Washington street at Branford Place? A I noticed that car standing, yes, right near Branford Place.

Q Did you notice what car it was? A The Kinney car.

Q From the time you ran out into the street and paid attention to this woman on the ground up to the time you saw it standing on Washington street near Branford Place you did not watch the car at all, in the interim, did you? A No.

Q I understood you to say something or other when you went back, because of the rain; did you say the car was moving very slowly or did you say the crowd was moving very slowly? A The crowd.

Q The car did come to a stop? A Yes, sir.

Q When the car stopped the door was opened, wasn't it? A Yes, sir.

Q Where did this automobile come from? A I don't know. All I know, the last I know I saw the automobile turn around and cutting across the car tracks, and it turned around and stopped right in front or alongside of Miss Ryan.

Q You mean the automobile had apparently been coming down the other direction, east on Market street, and turned around? A I wouldn't say it was coming or stood there, but I noticed it was headed west then.

Q Where was it with respect to the car tracks and curb when you first noticed it? A I don't know.

Harry W. Rowitz, re-direct.

Q When you first saw it where was it? A When I first saw it it was cutting across the car tracks, turning around the car tracks coming for me.

Q Facing which direction? A West, and it turned all the way around and stopped alongside of Miss Ryan, which was on Bamberger's side then.

Q West is up this way (indicating)? A Yes, sir.

Q When you first saw it it was directly across the tracks on Market street? A No, it was standing, I believe, near Bamberger's. Like, here is the car track (indicating), and I ran out here to pick Miss Ryan up, and as far as I noticed the car turned around the car tracks this way (indicating).

Q It came up alongside of where you were? A Yes, sir.

Re-direct examination by Mr. Heisley.

Q You have been asked about where this car stopped. Can you tell us whether or not that car stopped anywheres on Market street after you saw Miss Ryan lying on the street?

Mr. Fryling: I object. He has already testified he did not see the car from the time he paid attention to Miss Ryan lying on the street, until after he got in the automobile and was going up Market street.

A Will you repeat the question?

Q (Question read.) A No, sir.

Q Did it stop, or don't you know whether it stopped? A I don't know whether it stopped.

Q Did the conductor or motorman, or anybody in uniform, come back and help you pick up this girl? A No, sir.

HARRISON S. MARTLAND, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q You are a practicing physician, are you not? A I am.

Q You specialize? A I do.

Q In what? A In pathology, laboratory work, diagnosis.

Q Do you hold any official position in the county? A I am county physician at the present time.

Q Did you perform or were you present at the performance of an autopsy upon the body of Miss M. E. Gertrude Ryan? A I assisted the late Dr. Warren at an autopsy on the Ryan girl.

Q Dr. Warren is dead now? A Yes, sir.

Q You saw what the results were of the autopsy? A Yes, sir.

Q Tell us, in your own way, what the autopsy disclosed? A The autopsy was done on the body after it had been embalmed on June thirteenth around twelve o'clock at the home of the deceased. It showed evidence of an old injury to the brain. There was an old softening of the under surface of the frontal lobe on the left side, underneath which area was about one and a half inches in diameter and extended into the brain substance of about one-sixteenth of an inch, and the brain covering showed there had been—the covering of the brain was a dirty

reddish brown—showing there had been some time before a hemorrhage in that location followed by a softening and a localized traumatic encephalitis, and there was a smaller area over the interior surface just a little back on the left side also about one and a half inches in size, and over the covering of the brain the pramater and arachnoid over the top of the brain, in the delicate coverings of the surface of the brain, there was extensive pus formation; in other words, she has suppurated meningitis, which she died from. The cause of death was suppurated meningitis, determined later by—

Mr. Fryling: One minute.

The Witness: I determined later—

Mr. Fryling: I object to this unless you say from what fact you determined that. I have no objection to what was found later.

A (Continuing.) At the time of the autopsy I found a suppurated meningitis as the cause of death. In all probability due to a former injury to the brain.

Q When you speak of a former injury to the brain do you mean a disease of the brain or trauma of the brain? A A disease of the brain. Encephalitis due to trauma.

Q Do you mean by your answer that the cause of death, not the immediate cause, but the approximate cause, was trauma to the head? A Yes, sir.

Q And trauma, of course, means violence, force? A Yes, an external blow sufficient to produce a laceration and hemorrhage in a certain part of the brain. The force of the blow months ago probably being applied to the location of

the injury, the back of the head a little on the right side because the contrague hemorrhage is a little diagonally opposite.

Q Is it not a fact that contrague is this, that in an injury on one side the head the results will be just as much on the opposite side? A Yes, sir.

Q Will you say that this softening of the brain you found was on the opposite side from where the violence had been inflicted? A Yes, sir.

Q Is that all you noticed about it? A That is practically all the autopsy showed, a suppurated meningitis with evidence of an old cerebral trauma.

Q Old? A Old brain injury, and the rest of the body was nothing but emanciated. No pneumonia present and no pus in any of the sinuses.

Q Was she otherwise normal, except the emaciation, a healthy woman? A Yes, and probably a slight acute inflammation of the kidneys.

Q Were there any tubercular symptoms? A No.

Q Do you mean to say she died from suppurated meningitis? A Yes.

Q What causes suppurated meningitis generally? A Suppurated meningitis is usually caused by certain germs of which are the streptococcus, the staphy lococcus, which are the main cause. In other words, they are produced by what we speak of as the pus-producing germs.

Q Would the fact she had died from suppurated meningitis change your judgment, as I understood you to express it, that the original injury was the cause of that condition?

Mr. Fryling: I object.

(Withdraw the question.)

Q You say she died from suppurated meningitis, and you say you found evidence of an old brain injury? A Yes, sir.

Q In your judgment was or was there not a causal connection and relation between the suppurated meningitis and the old brain injury? A Positively there was a connection.

Q Did you see anything there in her anatomy or in the results of this autopsy which would indicate to you that anything else other than the old brain injury had caused this suppurated meningitis? A No, I did not.

Q Did you find any hemorrhages of the brain? A Only these areas as I have described as being evidence of an old hemorrhage.

Q Do I understand you correctly— A Those were several months before the hemorrhages in the brain cells.

Q These dark spots were evidence of the original brain injury? A The original brain hemorrhage, yes, sir.

Cross examination by Mr. Fryling.

Q Dr. Warren actually performed the autopsy, did he not? A I practically did the autopsy. Dr. Warren—under Dr. Warren's supervision.

Q The report was signed by Dr. Warren as county physician? A Yes, sir.

Q Were you assistant county physician at that time? A I was voluntary deputy county physician for a long time.

Q Did you see the report made by Dr. Warren, the death certificate? A I did not see the death certificate, but I saw Dr. Warren's record in the case.

Q You saw Dr. Warren's record in the case? A Yes, I have it with me.

Q The death certificate is made up from the record of the autopsy, is it not? A Yes, sir.

Q As a matter of fact, didn't the certificate and the records show—

Mr. Heisley: I object.

Q That the trauma was the secondary cause and not the primary cause of the death?

Mr. Heisley: I object on the ground the certificate is not—

The Court: Sustain the objection.

Q Isn't it a fact that the records made by Dr. Warren at the time this autopsy was performed show that the trauma was the secondary cause and not the primary cause?

Mr. Heisley: I object for the same reason.

The Court: Which record do you mean?

Mr. Fryling: The record of the autopsy made by Dr. Warren.

The Court: The record we have here?

Q Is that the record of the autopsy made by Dr. Warren? A Yes, these two cards are in Dr. Warren's handwriting.

Q That was made in your presence? A No, I did not see him make those. He had the habit

of making them while the autopsy was going on, or afterwards.

Q How soon afterwards did you see it? A This record?

Q Yes. A I saw it when I was subpoenaed in this case. The records of Dr. Warren, at his death, were turned over to me.

Q He was the county physician who wrote out the records of this autopsy and he has since died? A Yes, sir.

Q (By the Court.) Have you refreshed your recollection from those records? A Yes, sir.

Q (By Mr. Fryling.) Doesn't the records show that the trauma was the secondary cause of death rather than the primary cause? A Yes. That is Dr. Warren's interpretation that the primary cause is acute pneumococcus meningitis, and the secondary cause is an accidental fall from a trolley.

Q That is given as the secondary cause? A Yes, but it is a contributing cause.

Q In the autopsy was any examination made whether or not there was any tuberculosis? A In any autopsy any one who is familiar with autopsy work can see tuberculosis very plainly.

Q How can you do that? A By seeing definite formations in the lungs and any other organs that are characteristic of tuberculosis.

Q Doesn't that depend a great deal upon the extent of the tuberculosis and the length of time the person has suffered from tuberculosis? A If they are suffering and actually sick from it and actually die from tuberculosis, there is no reason why you cannot perfectly easily see it with your naked eye, but in the very beginning of tuberculosis you cannot see it with your naked eye.

Q Assuming that Miss Ryan did not die from tuberculosis, was your examination sufficiently minute or definite to determine that there was no tuberculosis at all there or might there have been some slight tuberculosis without your finding it? A Of all adults autopsied, about ninety-five per cent. have some slight focus of tuberculosis. It depends on how carefully you search for it and in that stage of tuberculosis it is a significant healed scar which is perfectly harmless in a large number of cases and this case had no active tuberculosis.

Q You were able to determine in this case that the meningitis was the immediate cause of death, didn't you? A Yes, sir.

Q You determined that definitely without Dr. Warren? A Absolutely.

Q Having determined that did you make any careful examination to determine whether or not there was any tuberculosis? A There was no extensive tuberculosis in any part of the body.

Q Did you make any careful examination, after having discovered what you considered the cause of death—and I am not now asking you as to whether the tuberculosis was the cause of death or not, but did you make any examination as to whether or not there was any tuberculosis? A Why, certainly.

Q Meningitis, you say, is a disease, isn't it? A It is.

Q A germ disease? A In meningitis most forms are due to germs. In suppurated meningitis practically all there is is the forms of meningeal irritation, which might be called meningitis, but not due to germs.

Q Is suppurated meningitis practically always a germ disease? A Suppurated meningitis is.

Harrison S. Martland, re-direct.

Q Are there other things that cause meningitis besides trauma? A Oh, yes.

Q What are some of the things that cause that? A Infection of the meninges or covering of the brain by any germ that is apt to cause meningitis that is circulating in the blood at the time.

Q By any germ that is apt to cause meningitis that is circulating in the blood at the time without any trauma? A Absolutely. That is a common form of meningitis; a common way in which meningitis occurs.

Q Can you tell, doctor, approximately the weight of Miss Ryan or couldn't you tell after she was embalmed? A The weight of what?

Q The approximate weight of Miss Ryan in her lifetime? A Her weight was put down as 115 pounds, that is on autopsy; five foot five.

Q Would the embalming have a tendency to increase the weight? A Sometimes it might increase and sometimes it might decrease it.

Re-direct examination by Mr. Heisley.

Q Now, in making an autopsy is or is it not a rule in regard to the part autopsied to examine the records to find if there was any trouble in any of the organs? A Positively.

Q Tell us what Mr. Fryling has referred to there in the report of Dr. Warren about the pneumococcus being the cause and the accident as the contributing cause. What does he say about that? A He says the cause of death—by Dr. Warren, is interpreted from a logical compilation of the history he had of the case, of the autopsy and the logical sequence of events.

Harrison S. Martland, re-direct.

Q What I mean is, what did Dr. Warren say of the cause of death and the contributing cause? A He said the cause—

Mr. Fryling: I object. I only asked the witness questions on things he had refreshed his memory on.

The Court: I will sustain the objection to that question. You can bring out the sense or meaning of anything he has testified to.

Q Dr. Warren said what in this record? Will you point out to me what he said? A He said the cause of death was acute pneumococcus meningitis and the contributing cause was her fall from the trolley car.

Q Are they the usual expressions used by physicians? A Yes, sir.

Q What is the distinction drawn, if any, by the medical profession between the cause of death and the contributing cause of death? What do you generally mean by that? A Well, it is a very difficult question to answer, because the primary cause of death and the contributing cause of death is very often mixed up. It is very hard, in many cases, to decide what is the primary cause, what you can assign as the primary cause, and what as the contributing cause.

Q The thing that actually caused the heart to cease existing was pneumococcus? A Pneumococcus meningitis.

Q The thing that aided in that culmination was a trolley accident?

Mr. Fryling: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q The pneumococcus was the thing with which she was last afflicted before she died? A Yes, sir, acute pneumococcus meningitis.

Q What would produce pneumococcus, would trauma produce it? A Trauma would and in this case it did.

Q Is this true, that trauma can cause pneumococcus but pneumococcus cannot cause trauma, isn't that right?

The Court: I do not think that is a fair question.

Re-cross examination by Mr. Fryling.

Q Pneumococcus is a germ? A Yes, that is the germ that frequently causes most pneumonias.

Q Trauma does not put that germ in the body? A Trauma does sometimes.

Q It puts the germ in the body? A Yes, sometimes in some fractured skulls the pneumococcus might be in the middle ear and might be introduced into the brain by trauma.

BENJAMIN FRIEDMAN, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q What is your business? A At present I am working in the post office.

Q In January, 1924, where were you working? A At Bamberger's.

Q In what capacity? A Salesman.

Q Where do you live at the present time? A 145 Hedden Terrace.

Q Do you recall the night of this accident to Miss Ryan? A Yes, sir.

Q Did you see it, or not? A Yes, sir.

Q What kind of weather was it? A Very stormy; raining very hard and misty out.

Q Is it true it was somewheres around six o'clock? A Yes, sir.

Q Did you see the accident? A I was right on the trolley when it happened.

Q What part of the trolley were you on? A On the step of the back platform.

Q Were the doors of the trolley open or closed at the time you were on the step? A Open.

Q Was the car standing or moving when you were on the step? A Well, it wasn't exactly on the step. I tried to get on the step when the car was not going, but at a standstill and before that accident happened Miss Ryan was on the step with me.

Q She was on the step ahead of you or after you? A I think she was up ahead of me, in fact there was so many people trying to crowd in that trolley I didn't know exactly who was around me. I do know there was a woman in front and a couple of men in back and all trying to shove in the platform.

Q At that time was the car standing or moving? A At that time the car was at a standstill.

Q Were the doors closed or open at that time? A Open.

Q You say Miss Ryan got on the step ahead of you or not? A Yes, she was right ahead of me.

Mr. Fryling: I object. He said he did not know whether she was around him.

Q Did you see Miss Ryan injured? A Yes, sir.

Q Where were you at the time she was injured? A On the step of the platform of the car.

Q Not on the platform, but on the step? A On the step, yes, sir.

Q Where was Miss Ryan, if you saw her before she was injured? A Right on my side, alongside of me.

Q Was there anybody between you and her? A There were men inside trying to get in.

Q You say that you were on the step and that she was on the step? A Yes, sir.

Q I want to know whether she was immediately next to you on the step or was there someone between you and her? A She was immediately next to me.

Q On which side of you? A The right-hand side.

Q Who was on your left-hand side? A There were two young ladies on my left-hand side.

Q When she was on the step and these two young ladies were on the step and you were on the step at that time, was the car moving or standing? A The car was moving at that time, when I turned around and noticed who was standing on the step with me.

Q Do you recall just when the car started? A Yes, I distinctly recall that the car started;

in fact, we were all trying to shove in, both in front of me and the people in back of me.

Q Do you know whether the car started before or after these girls, including Miss Ryan, were on this lower step with you? Did it start before or after you noticed them? A I noticed after the car was on the move who was next to me. I noticed that when the car was on the move; I couldn't notice that before when the car was at a standstill because there was so many people around there.

Q Did you actually see Miss Ryan get up on the step or was the first you saw of her when she was on the step? A When I first saw her she was on the step.

Q At that time the car was moving? A Yes, sir.

Q At that time? A Yes, sir.

Q You did not actually see her leave the street and get on the step, did you? A No, sir.

Q Was there any conductor on the platform? A Yes, sir.

Q Where was he standing? A Right in front of his fare-box, and he opened his door for the people to go out, and he was standing at this side door there, where the people go out—there is two doors, one to go in and one to go out and the conductor was standing at the side where the people go out.

Mr. Fryling: I object to that and ask that it be stricken out.

The Court: Strike that out.

Q (By the Court.) Where was this conductor? A Standing at the fare-box, right near the outside door where the people go out.

Q That would be the right-hand door as you went in, wouldn't it? A Yes, sir.

Q (By Mr. Heisley.) Do I understand that he really was between the fare-box and the steps? A Yes, the fare-box and the door.

Q Now, was the car full or not full? A On the platform it was full and inside the car I couldn't say, because I couldn't see through the windows, but I could safely say—

Mr. Fryling: I object. Do not tell us anything you do not know.

Q How far did you ride on that car? A All the way to my destination.

Q Where was that, down Washington street, past Branford Place, I suppose? A Yes, sir.

Q Did you notice after the car started whether there was space in the interior of the car or not for passengers? A I didn't notice if there was any space until we turned around on Washington street.

Q What did you notice then? A That there was plenty of room in the front of the car.

Q That would be the far end of the car? A Yes, sir.

Q What did you see happening? Tell in your own way what you saw happen and how Miss Ryan, if you know, got hurt. A Well, I will start at the beginning where I tried to get on the trolley car, and I was shoving with the rest of the people on the trolley car and the people in back of me and in front of me were all trying to shove on the trolley car and this conductor didn't give any warning at all.

Mr. Fryling: I object to that and ask that it be stricken out, "this conductor didn't give any warning at all."

Mr. Heisley: I insist it is competent, your Honor.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A (Continuing.) —he rang the bell.

Q How do you know? A I saw him ring it and distinctly heard the bell.

Q Did you see him ring the bell? A Positively.

Q What act did you see the conductor do to pull the bell? A He raised his hand up and pulled on the bell-cord twice.

Q How many times did you hear the bell ring? A Twice.

Q What did the car do, stop or still remain standing? A The minute he rang the bell it went forward with a jerk.

Q Had you seen Miss Ryan before you saw the conductor pull the bell or not? A No, sir.

Q When was it after the conductor pulled the bell and you looked around and saw Miss Ryan and the other girls on the step? A As soon as the car started forward.

Q What did you do, if anything? A I was holding on to the platform and the other two girls were trying to get ahold so they could stand on the platform with me, but while the car was moving one of the girls stepped off and stepped off safely on to the street.

Q On to the street? A Yes, sir, and the other girl stepped off and she stepped and fell

in a sitting position and Miss Ryan slipped off, because the platform was slippery, because I had all I could do to stand there myself and she slipped off and fell on the back of her skull—you could hear the sound a block away.

Mr. Fryling: I object to that and ask that it be stricken out, as to the block away.

The Court: Yes.

Q Did Miss Ryan fall before the conductor rang the bell or after the conductor rang the bell? A Afterwards.

Q Did you notice whether the doors were open at all? A The doors were open.

Q When the conductor rang the bell and you say people were on the step, were the doors open or closed at that time? A Open.

Q Did you say anything to the conductor? A Yes, I told this—

Mr. Fryling: I object.

Q When did you speak to him as regards the time when Miss Ryan went off the step, was it before, at the time, or right after, or when? A As soon as I heard the sound of the fall.

Q What did you say to the conductor?

Mr. Fryling: I object.

The Court: Sustain the objection.

Q What did the conductor do? A He didn't do absolutely anything.

Q Without repeating the language which you used to the conductor, did you call the attention of the conductor to the fact that a girl had been

thrown or had fallen off of his moving car? A Yes, sir.

Q Did he make you any reply? A No, sir.

Q Did he close the door? A No, sir.

Mr. Fryling: I object. Do not lead the witness.

Q Where did the car stop after that? A In front of Miner's Theatre.

Q That is on Washington street? A Yes, sir.

Q Are you sure that is the first place it stopped? A Yes, sir, I am sure that is the first place it stopped.

Q Was the platform then crowded or not? A I found myself and four other gentlemen on the platform.

Q What had become of the other people who had been on the platform? A They were inside in the car.

Q Did the conductor go back to this girl? A No, sir.

Q Did the car then continue on its way? A Yes, sir.

Q That is all you know of it, isn't it? A Yes, sir.

Q Did you notice who picked her up? A No, sir, all I noticed I turned around and I noticed a car turn around.

Q You mean— A An automobile turned around and stopped in front of Miss Ryan and that's all I saw and then we turned around into Washington street.

Q Are you related at all to the Ryans? A No, sir.

Q Not interested in this case at all? A No, sir, the only interest I have—

Q Have you any interest in the outcome of this case? A No, sir, this is the first time I have been at a trial and I am kind of interested in the proceedings.

Q You are here under subpoena? A Yes, sir.

Q You do not participate in any verdicts or anything like that? A No, sir.

Cross examination by Mr. Fryling.

Q Did you know Miss Ryan? A No, sir.

Q Did you know that she was one of the girls that worked in the store where you worked? A No, sir.

Q Were you interested to know whether she was hurt when you saw her fall off the car on to the street? A Sure.

Q You did not get off the car, did you? A No, sir, I couldn't get off.

Q You were on the step? A I was on the step.

Q When the car turned around the curve there from Market street into Washington street you did not get off? A No, because it was still going.

Q Was it going around so fast you could not get off? A I was afraid to take a chance because it was slippery.

Q Was there ice around? A It wasn't icy, but the weather was kind of cool and the platform was wet.

Q It was not cold enough to freeze? A No.

Q It was rainy, wasn't it? A Yes, sir.

Q After the car went around and got into Washington street it stopped at the theatre there close to Market street? A Yes, sir.

Q You were not interested enough then to go back and see whether the girl you saw fall off was hurt? A I couldn't get off, because people were trying to get on.

Q You could not get off? A No, sir.

Q Where were you then? A On the rear end of the platform.

Q After you saw the girl fall off you went up off the step on to the platform? A Yes, sir.

Q You did not intend to get off? A I was afraid to get off.

Q You did not intend to get off to see what happened to her? A Not after I saw the automobile turn around.

Q About how many people would you say were crowding on the car when the car stopped in front of Bamberger's? A I couldn't tell the exact number of feet.

Q Give me a rough estimate of how many there were? A How many people?

Q Yes. Twenty-five or thirty? A Oh, no, about fifteen or twenty.

Q Fifteen or twenty people? A Yes, sir.

Q That is, as the car pulled up in front of Bamberger's there were fifteen or twenty people to get on it? A Yes, sir.

Q And you were one of them? A Yes, sir.

Q You were one of the last, weren't you? A No, there were others in back of me.

Q About how many of them got on? What is your best judgment as to that? A About ten.

Q About ten, you think, got on? A Yes, sir.

Q Were you one of the last that got on at that place? A Yes, sir.

Q After all these people got on the car started? A Yes, sir.

Q And then for the first time you noticed this lady whom you afterwards discovered to be Miss Ryan? A Yes, sir.

Q Was on your right on the step? A Yes, sir.

Q How many steps were there on that car? A One step.

Q You were on the step? A Yes, sir.

Q And two other girls were on the step? A Yes, sir.

Q So there were four on the step altogether? A Yes, sir.

Q And the platform ahead of you was crowded? A Yes, sir.

Q And everyone was shoving, weren't they? A Shoving.

Q When you first noticed Miss Ryan on the step, as I understood you to say, the car was then moving? A Yes, sir.

Q About how many people were on the platform between you and the inside entrance of the car as you were on the step? A Well, I couldn't count them.

Q Was it entirely crowded? A Yes, sir.

Q Crowded so that one stood right up against the other? A Yes, sir.

Q How many people do you say there was between you and the conductor? A How many people between me and the conductor? Four.

Q That is four solid rows of people between you and the conductor? A Not rows, four persons; I don't know how many rows there was.

Q How many doors were there at the rear? A Two.

Q Were they both open when the car came to a stop or only one? A Only one.

Q Which one? A The rear one.

Q So the door on the back platform which leads from the platform out to the street, towards the body of the car, was not open; is that correct? A You mean the door the people go out of?

Q I understood you to say that from the back step there are two doors? A Yes, sir.

Q Leading from the platform to the street? A Yes, sir.

Q Is that correct? A Yes, sir.

Q One of them, the rear one was open? A They were both open.

Q Were they both open? A Yes, sir.

Q Were there handles alongside of the door to hold on? A No, sir; the only thing to hold on was the iron rod which supports the doors.

Q On the body of the car was there a rail or a ring to hold on? A In the body of the car?

Q Yes, to the right of the front of the two entrances? A The only rail I saw was the iron rail that covers the windows.

Q Isn't there some railing or handle to get ahold on at the rear of the body, to get on? A Yes, there is a little loop there.

Q Between the two rear entrances there is an iron bar? A Yes, sir.

Q And at the back of the platform there is another railing or something to hold on to, isn't there? A Yes, sir.

Q Were you holding on? A Yes, sir.

Q To what? A To the rod between the both doors.

Q On which part of the step were you? Were you in front of the two doors or in front of the rear door, or how? A Right in front of the rod.

Q The only person between you and the bottom step was Miss Ryan? A Miss Ryan was on my right-hand side on the step with me.

Q She was between you and the body of the car? A Yes, sir.

Q You were facing toward the car? A Yes.

Q On your left were those two other girls towards the rear? A No, Miss Ryan was at the rear and these girls were towards the front. Miss Ryan was on my left and those two girls were on my right as I faced the car.

Q How far from where you were standing from the step was the fare-box? A An arm's length, I should judge.

Q There were more people standing between you and the conductor? A Yes, sir.

Q Up on the platform? A Yes, sir.

Q Notwithstanding the four people were there you couldn't see the conductor? A I could see the cap of the conductor.

Q You were noticing what he did? A Yes, sir.

Q You were? A I noticed the only thing his hand came up and got the bell cord.

Q You could see his hand go up notwithstanding the fact that there were four people between you and he? A Yes, sir.

Q You were paying particular attention to him at that time? A Yes, sir.

Q You were trying to get on the car? A Yes, and at the same time trying to give him my fare.

Q You were pushing and the others were all pushing? A Yes, sir.

Q You had not yet got up on the platform of the car? A No.

Q You were trying to pay your fare then? A Yes.

Q You were paying particular attention to the fare even with the pushing and trying to get on the car, during all that course you were watching to see what the conductor did? A I was watching to see if he would shout some warning so we could close the door.

Q There were too many people to close the door, weren't there? A Yes, sir.

Q The door could not have been closed in the position the passengers were crushng on there? A No.

Q As a matter of fact did you actually see the conductor's arm go up or did you just hear the bell? A I saw his arm go up.

Q Do you know why this one lady stepped off the car? A Which lady are you referring to?

Q You say first one lady stepped off safely? A Yes, that was just as soon as he rang the bell.

Q She stepped off? A Yes, sir.

Q Did she step off backwards? A Yes, sir.

Q The second one stepped off backwards? A Yes, sir, and fell in a sitting position.

Q Did both of these ladies voluntarily step off the car? A Yes, sir.

Q It was your opinion that this girl, whom you later found out to be Miss Ryan, slipped off?

Mr. Heisley: I object to what his opinion was.

The Court: Sustain the objection to this question, but you may inquire as to what he meant when he said "slipped off the platform," or off the step.

Q In which direction was Miss Ryan facing when she slipped off the step? A I couldn't tell you exactly which direction she was facing.

Q Were you looking at her at the time? A No, sir.

Q She was to the left of you towards the rear of the car? A Yes, sir.

Q You could not tell whether she was facing towards the front, rear, or outside or inside of the car? A No.

Q Because you did not see her? You knew she was alongside of you, but you were not looking at her? A No.

Q During all the time that she was there, there was this crushing and crowding going on, wasn't there? A Yes, in front.

Q As a matter of fact, the only thing you know is, she disappeared off that step, isn't that so? A Yes.

Q That is all you know about it? A Yes, sir.

Q (By the Court.) What do you mean by the term "slip"? A Slip, I mean she fell off.

Q Were you looking at her feet or the step? A No.

Q Did she have ahold of anything? A I can't remember. As a matter of fact I didn't happen to see her at all. All I know it was a lady on my left-hand side.

Q What do you mean, "She slipped off"? That she disappeared from the step? A Yes, sir.

Q You did not mean that she was standing on anything slippery? A Well, the step was slippery, because I had to hold on myself.

Q What do you mean when you said, "She slipped off the step"? Is that the opinion you formed or did you see her do that? A I saw her fall off.

Q What do you mean by "slipped"? A She couldn't fall herself. She must have slipped

down; a person won't naturally fall off a trolley car themselves.

Q (By Mr. Fryling.) But you do not know what happened in this case, because you did not see her at the time, did you? A I didn't get you.

Q Didn't you just say that all you knew was that you knew there was a girl alongside of you? A Yes, sir.

Q You were not looking at her? A No.

Q She disappeared off the step? A I felt a move on my left-hand side and saw her fall.

Q You do not know whether she stepped off or slipped off or was pushed off, do you? A No, sir.

Re-direct examination by Mr. Heisley.

Q When did she disappear from the step as regards the time when you saw the conductor ringing the bell and knew that the car was starting? Was it at that time, before that time, or afterwards, or when? A A few seconds; I don't know.

Q Did you hear this conductor or anybody in charge of that trolley car give any warning that the car was about to start before the conductor rang the bell? A No, sir.

Q Was any warning given? A No, sir.

CHARLES L. O'NEIL, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q You are a member of the medical profession? A Yes, sir.

Q How long have you been such? A About seventeen years.

Q What college are you a graduate of? A Cornell.

Q You practice your profession in this city all the time? A Yes, sir.

Q Where is your residence? A 11 North Seventh street, Newark.

Q Are you in general practice? A Yes, sir.

Q You knew Miss M. E. Gertrude Ryan? A Yes, sir.

Q You knew her family, I think, for some time, did you not? A Yes, sir.

Q Had you been their family physician? A I believe I was.

Q Had you attended them professionally before this occurrence of which we are about to speak? A Yes, sir.

Q How long had you known M. E. Gertrude Ryan? A I knew her to see for at least fifteen to twenty years, but I knew her as a patient for about five or six years.

Q Now, prior to January 16th, 1924, I refer to the time when this unfortunate accident occurred, can you tell us from your own knowledge what her general condition of health was? A Her general condition of health was good.

Q Had you ever attended her professionally? A Yes, sir.

Q For what? A In October, 1921, I operated on her for appendicitis and an ovarian cyst.

Q Did she recover from that all right or not? A The recovery was very uneventful.

Q Was there any other thing you ever treated her for? A In the winter of 1922, I believe in January, I believe she had the grippe, and a

slight attack of pleurisy and bronchitis which laid her up for three weeks.

Q Did she have any other illness that you know of requiring medical attention during all the years you knew her? A No, there is none that I recall until January 16th, 1924.

Q I am excluding that. How was she as to weight, flesh, and so forth? Was she a well-nourished woman or not? A She was of medium size, very slight build, very wiry, but in good health.

Q Was there any indication of tuberculosis that you could see? A None I ever saw.

Q This bronchitis, was that simple bronchitis or something else? A That simply was a condition that lasted a couple of weeks and cleared up entirely.

Q I believe you attended her soon after this happening on the sixteenth of January, didn't you? A Yes, sir.

Q Where did you first see her and at what time? A My office was notified that she had been in an accident and was at the City Hospital. I saw her at the City Hospital around eleven o'clock the same night of the accident.

Q Where was she in the hospital? On a cot, or where? A Oh, yes, in bed.

Q Undressed? A Yes, she had the ordinary hospital clothes on.

Q Was she unconscious? A She was.

Q Did you make any examination of her? A Outside of feeling her pulse and asking her how she was—she was not under my care at that time; she was a hospital patient.

Q Then, you did not examine her head, I understand you to say, at all? A Her head was bandaged.

Q So, if she was injured, I assume the bandage would interfere with your seeing her unless you took the bandage off. You did not do that? A No.

Q She was taken home when? A The next day, the seventeenth of January.

Q Do you know how she was taken home—whether she was able to walk home or not? Or don't you know of your own knowledge? A She was not able to walk home.

Q Did you call on her after your visit to her on the night of the sixteenth at the City Hospital? A I saw her again the morning of the seventeenth at the hospital.

Q Did you make any examination of her then? A No, sir.

Q I presume for the same reason she was still in the hospital? A Yes, sir.

Q When did you see her at her home, if at all? A I think it was the afternoon of the seventeenth, the same day I had been to the hospital in the morning.

Q Was she in bed, or not in bed? A She was in bed.

Q Did you make an examination of her then? A Just a cursory examination.

Q You have told us when you went to the hospital her head was bandaged? A On the seventeenth.

Q Did you make an examination of her head? A Not until the day after; the same day she was home.

Q That would be the eighteenth? A Yes, sir.

Q What time did you call there on the eighteenth? A I couldn't be sure about that. Some time during the day.

Q Did you make any examination then of her head? A Yes, sir.

Q What did you do? A Well, I removed the bandages and found she had a lacerated wound of her scalp.

Q Put your hand on your head where you mean. A It was above and behind the right ear.

Q How long was it? A At least two inches. There were three stitches that had been taken at the hospital and on account of the stitches puckering a little bit there was a little pus in each one of the stitches and I removed them and cleaned a bigger area of her hair around the scalp wound which gave her more of a clean scalp wound than she had and put on wet dressings and bandaged her head up again.

Q The wet dressing consisted of what? A Some ordinary antiseptic solution, I don't just recall. It might have been bichloride of mercury or carbolic.

Q Did you notice any other wounds or bruises on any other portion of her anatomy? A She complained of being sore all over.

Q You saw no other wounds? A I don't recall any.

Q What was her condition when you saw her on the eighteenth? A The girl was very nervous and tossing around in bed and could not sleep. She had no appetite at all and complained of pain in the back of her head, pain in her right car and a pumping puffing noise continuously in her right ear.

SECOND DAY.

February 5, 1926.

Continued pursuant to adjournment.

Present, counsel as before stated.

Q How long did you attend her from the sixteenth of January until the time of her death, all the time, or only part of the time? A All the time.

Q How frequent were your calls? A From the time of the accident I made a call daily for about a month.

Q Was that necessary, or not? A Yes, sir.

Q Why was it necessary? A To dress the scalp wound.

Q After that month, what would you say? A About every second day, probably every week or two and every third day up until around the first of March.

Q Then, after that? A After that she came to the office at intervals of five days all week up until June ninth and on June tenth I was calling to see her at her home and I saw her June tenth, eleventh and twelfth.

Q We will leave those last three days out of the present consideration. How long was she in bed continuously after she returned from the hospital on the seventeenth of January? A The following month.

Q Then, she got up, and did she go out? A No, I think the first time she went out was about the fourth of March and she went out at that time to see Dr. Potter.

Q He is an ear specialist? A Yes, sir.

Q Was she at any time from the sixteenth of January down to the time of her death capable of doing any work, that is following her occupation as a saleslady at Bamberger's? A No, sir.

Q What was she suffering from, did you say, during that period? A She was suffering from the effects of this injury.

Q You had been given the history of an accident, I suppose, had you? A Yes, sir.

Q Did you see any evidence of that injury excepting the obvious facts of a lacerated scalp? A The fact that she complained continuously of this pain on the right side of her head and her right ear and continually vomited and in her right ear the fact that she had no feeling, she did not care, she felt so badly, she felt nothing about work; she did not feel as if she wanted to go to work.

Mr. Fryling: I object.

Q How was she as to nervous after say six or eight weeks after the accident. Was she nervous or not? A She was very nervous.

Q Did her condition change in any way either for the better or the worse, down to the eighth or ninth of June? I believe she died on the twelfth. A Her condition improved—her general condition improved some, but not her head condition.

Q What was the serious trouble with her, was it the head or some other part? A Her head.

Q While I have you here, what was the total amount of your bill?

Mr. Fryling: I object on the ground it is claimed that the death was the result of

this accident, and therefore, my contention is that any medical expenses during the life of this deceased cannot be recovered and I am making this objection notwithstanding the decision of the Court of Errors in the case of Soden, in order to have my objection on the record. I object to this question at this time.

Mr. Heisley: I ask this question in the case of the general administrator.

The Court: You agreed to try both these cases together.

Q (Question read.)

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: You mean from the time of her injury to the time of her death?

Mr. Heisley: Yes.

Q (Strike out that question.)

Mr. Heisley: I desire to ask the witness this question and do ask it in the case of the general administrator only.

Q Dr. O'Neil, what was the total amount of your bill for medical services rendered for the deceased on account of this injury which she is said to have received on the sixteenth of January, down to the time of her death, but for no other cause of complaint?

Mr. Fryling: I object to the question on the ground it being claimed that death was the result of this accident, the plaintiff, as

general administrator of Miss Ryan, cannot recover damages as the result of this accident, and that the only recovery that can be had in this case is by the administrator *ad prosequendum.*

(Argument.)

Mr. Fryling: I take it that the Court must rule against me in the face of the Soden case, but I make this objection for the record in view of the fact that it seems the Court has gone astray in some of its views as expressed in the Soden case. For instance, my contention is, if the recovery is had by the deceased, Miss Ryan, in her lifetime, that then no cause of action for death can be maintained and that at this instance the general administrator stands exactly in the same position Miss Ryan did if she was living, and if the general administrator, in the face of Miss Ryan recovering damages for injuries, that would preclude an action under the Death Act, and therefore I think—

(Argument.)

Mr. Fryling: When I make that objection I presume the Court will rule against me in view of the Soden case.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (By Mr. Heisley.) Do you recall the question?

The Court: Read the question again.

Q (Question read.) A $210.

Q Was that a reasonable charge? A Yes, sir.

Q Doctor, you say she complained of pain in her head and this puffing and other noises. Will you tell us from your medical experience, if you can, what kind of pain would an injury of that character, that is to say, the cause of a fall from a trolley car on a stone pavement, what kind of a pain would a person receive from such an injury, dull, soft or what kind of a pain?

Mr. Fryling: I object. I assume the question is based on the suit of the general administrator, and my objection is on the ground the general administrator in an action of this kind is not entitled to recover for any pain or suffering.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) Describe the intensity, the degree of intensity. A It will be a severe pain.

Q Why? A Because of the shaking up of the brain.

Q Of course, that is one of the sensitive organs, isn't it, the brain? A Yes, sir.

Q What would you say as to the presence of this pain, whether it would be present always or intermittent pain; and would it be of the same intensity all the time or would it slacken down at other times? A It would be always severe.

Q Would it vary in intensity, in your judgment, or not? A At times, yes. It would always be severe, but at times might be more severe.

Q And at other times less severe, I suppose? A Well, it would always be severe.

Q Would it be a pain of sufficient intensity to affect the patient's ability to sleep at night? A Yes.

Q Now, come to the ninth of June, and from that time on until her death. Do you recall you said you were called to her house on the ninth? A The tenth.

Q Tell his Honor and the jury in your own way what you found and what occurred from that time on until this lady died. A I was called on the morning of June tenth.

Q When had you last seen her? A June ninth.

Q What was her condition on June ninth? A On June ninth I saw her at my office and she was complaining of this pumping in her head and she had not gotten any relief at all from it, and—well, she was out and around when she came to my office and I told her to stop in again. The next morning—

Q That was the tenth? A Yes, the tenth, quite early I called to the house and she was complaining then that instead of the usual noise she likened the noise in her ear to the pumping of a locomotive.

Q She was in bed or up when you saw her on the tenth? A Up, sitting in the chair.

Q Dressed? A No, she was in her night-gown; she could not rest even while I was there. She was out of the chair and walking around, and very nervous and upset, and the noises, she said, instead of one locomotive pumping in her ear, there were dozens of them, and that the—

Mr. Fryling: I object to any conversation she may have had with the doctor.

The Court: Proceed.

A (Continuing.) The throbbing she said now was like a dozen locomotives. She could not rest, she could not sit—

Mr. Fryling: I object. I think this conversation is improper and not like an expression.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A (Continuing.) She could not rest in the chair and was getting up and walking from here to there (indicating) and holding her head and holding on to it, and her hair was all down and she was pulling on it and begging me to do something to relieve her. She was going crazy, she could not sleep at night and was in a frightful condition and begged me to give her some morphine to put her to sleep, or out of the way, do something for her, and I prescribed a little nerve sedative for her and told her I would come back, and if she got no relief from that then I would give her something to put her to sleep. That was around eight o'clock in the morning. About two o'clock I returned there and found her in bed unconscious with signs of meningitis.

Q What do you mean by meningitis? A Inflammation of the coverings of the brain, and knowing that this condition was a very dangerous one on account of the chain of circumstances, I called in a brain doctor.

Q Who was that? A Dr. Dowd, and Dr. Dowd and I agreed she had meningitis and we

sent her—he advised her being sent to the City Hospital to have her spine tapped to relieve the meningeal irritation, and she was taken to the hospital.

Q Was she conscious or unconscious at that time? A She was unconscious.

Q How was she taken? A She was taken to the hospital in the ambulance and she was returned home on the—the tenth was the day I was called and the eleventh she was removed to the hospital, and the twelfth, around noon she was removed from the hospital to her home and she died near midnight the night of the twelfth.

Q Did you see her at the hospital? A I don't just recall that I did.

Q Did you see her after she was returned home on the twelfth? A Yes, sir.

Q Do you know of your own knowledge whether or not there had been an examination made of her spine, a puncture made of her spine? A Yes, sir.

Q Do you know of your own knowledge what the puncture revealed?

Mr. Fryling: Yes or no.

A Yes.

Q What did it reveal?

Mr. Fryling: I object unless it appears that the doctor made this test, otherwise I do not think he is competent to testify.

The Court: I will admit it.

Q You say you know of your own knowledge what the puncture revealed? A Of my own knowledge?

Q Yes. A I wasn't there and I didn't see it.

Q Then, you do not know it of your own knowledge, personal knowledge? A No.

Q Did you see her after she was returned to her home on the twelfth? A Yes, sir.

Q When did you see her on the twelfth? A On the afternoon of the twelfth.

Q Where was she? A Home.

Q In bed or sitting up ? A In bed.

Q Conscious or unconscious? A Unconscious.

Q As far as you know did she ever recover consciousness from the time you found her unconscious, I think you said, about two o'clock on the day of the tenth until she died about midnight of the twelfth? A No, sir.

Q Could you tell from your attendance upon her what was the cause of her death? A Yes, sir.

Q What was it? A Meningitis.

Q Which you have already described. Caused by what? A Caused by this accident.

Q In other words, caused by trauma? A Caused by trauma.

Q Have you any doubt about that? A No, sir.

Q Did you see in her any evidence of any other complaint or illness or cause for her death except this meningitis? A No, sir.

Q You were not present at the autopsy? A No, sir.

Cross examination by Mr. Fryling.

Q Meningitis is caused by quite a number of other things besides trauma, is it not? A Yes, sir.

Q What are some of the causes other than trauma? A The middle ear condition, as a secondary infection from pneumonia. Erysipelas, scarlet fever; also from an infection near the brain as to some infection of the nose, ear.

Q It is a germ disease, isn't it? A Yes, sir.

Q In treating Miss Ryan did you examine the X-rays taken at the hospital? A No, sir.

Q Did you ever have X-rays made yourself of the head of Miss Ryan? A No, sir.

Q As a matter of fact, the situation did not present a serious situation until around the ninth or tenth of June, did it? A Yes.

Q You mean by that it did not present a serious situation? A It did.

Q Before that? A Yes, sir.

Q When? A At all times.

Q Due to the injury of the head? A Yes, sir.

Q You were treating her all the time from the time of the accident up until the time of her death? A Yes, sir.

Q You had been to the hospital a couple of times during the day or two when she was there? A Yes, sir.

Q You knew that X-rays had been taken of her head, did you not? A Yes, sir.

Q Did you inquire as to the result of the X-ray examinations? A Yes, they were told to me.

Q You were familiar with them, were you? A Yes, sir.

Q You were satisfied there was nothing about the X-ray examinations that could assist you in your treatment of Miss Ryan. That is true, isn't it? A I don't know much about X-rays, only from the interpretations by the X-ray men; I take their interpretations.

Q The X-rays were taken in the hospital by someone who did know about X-rays? A Yes, sir.

Q You took their interpretation of the X-rays? A Yes, sir.

Q That interpretation of the X-rays you took, in other words, it showed there was no injury to the skull. So there was nothing that could help you in your treatment of that, was there? A No, sir.

Q Miss Ryan gradually improved, did she not, after the accident, for some time, so that she, after a while was able to go out of the house? A Yes, sir.

Q On the ninth of June she was out and around, then, wasn't she? A Yes, sir.

Q She came to your office on that day? A Yes, sir.

Q On that day you told her she had better come around again in a couple of days, didn't you? A Yes, sir.

Q Then, suddenly on the tenth, a change took place? A Yes, sir.

Q Doctor, Miss Ryan was—I believe you described her as being of medium weight. About what weight do you say she was at the time of this accident? A little less than one hundred pounds or something like that? A At the time of the accident?

Q Yes. A I would say about between 110 and 120.

Q About how tall was she? A About five feet and a half, five foot five or five foot six.

Q Was she of a neurotic temperament? A No.

Q Hadn't you been treating her for some time prior to the accident for nervousness? A

The only time I recall treating her for her nervousness was after the operation.

Q That is the operation— A 1921.

Q In 1921 she was operated on for appendicitis? A Yes, sir.

Q You performed that operation? A Yes, sir.

Q At one time in January, 1922, she was operated on for a tumor? A Both at the same time.

Q Wasn't she operated on for a tumor? A A cyst is a tumor.

Q (By the Court.) How large a tumor was that? A Very small.

Q (By Mr. Fryling.) A tumor on the ovary? A Yes, sir.

Q Doesn't an infection of the ovary have a tendency to affect the nervous condition of a woman? A Yes, sir.

Q Haven't you off and on for a long time after the shock of the operations treated her for nervousness? A Up to and around the same time when I treated her for a grippe in January.

Q In 1922? A Yes, sir.

Q Subsequent to that for a long time hadn't you treated her for shock of the operations? A No, sir.

Q Well, had you treated her at any time subsequent to that for nervousness? Subsequent to the operations for nervousness? A I don't recall having treated her any time subsequent.

Q Did you ever notice any rales in your examination of the lungs? A No, sir.

Q Did you ever examine them? A Did I ever examine the lungs?

Q Yes. A Yes, sir.

Q Did you examine them at the time of the accident? A Yes, sir.

Q Or prior to the accident? A At any time I had seen her previously. As I say, I do not recall having seen or treating her after that condition of grippe and pleurisy in January, 1922.

Q You had nothing to do with the entering of the language on these records in the hospital, had you? A No, sir.

Re-direct examination by Mr. Heisley.

Q Mr. Fryling has asked you to name the various causes which may produce meningitis and you have mentioned them. Was there any evidence to your medical mind of any of those causes existing in Miss Ryan? A Trauma.

Q But answer me responsively. You say trauma, but I want to know if there was any evidence of this other disease which might cause meningitis existing in Miss Ryan? A None.

Q I think I did ask you what was her recovery from the operation for the cyst or tumor; was it a good, complete recovery or not? A Perfect.

Q To your mind did the operation, or the cause of that operation, namely the cyst, have anything to do with causing her death? A Absolutely none.

Re-cross examination by Mr. Fryling.

Q The presence of pneumococcus germs is a cause of meningitis, isn't it? A Yes, sir.

Q They were present, weren't they? A Sir?

Q They were present? A Yes, sir.

Julia T. Ryan, direct.

JULIA T. RYAN, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q You are the sister of the late Miss M. E. Gertrude Ryan? A Yes, sir.

Q You do not mind telling us how old you are? A No.

Q Let us have it. A Forty.

Q How old was your sister? A Thirty-eight when she died.

Q You two girls, I think, were single? A Yes, sir.

Q Neither of you had ever been married? A No, sir.

Q You are still single? A Still single.

Q Where did you and your sister live prior to the sixteenth, that is, before the sixteenth of January, 1924? A 115 Eleventh avenue.

Q I think that is a house that you two girls and your brother owned, isn't that right? A Yes, sir.

Q I think you inherited it? A We inherited it from an uncle.

Q (By the Court.) You have a brother? A Yes, Mr. Ryan.

Q (By Mr. Heisley.) Did anyone else live with you two ladies there? A No, sir, just my sister and I.

Q Your brother is married? A Yes, sir.

Q Living with his wife? A His wife and child.

Q Where do they live? A 55 Richelieu Terrace.

Q Your sister, I believe it is admitted, was employed at Bamberger's from the year 1915? A Yes, sir.

Q Down to the time of this accident? A Yes, sir.

Q During all that time from 1915 down to the time of her death did you and your sister live at this same house? A The same house.

Q How long had you lived there together in that same house? A Well, had she lived until August we would have been there three years in that house.

Q She died in 1924, didn't she? A Yes, sir.

Q Did you only live there three years? A Three years the twenty-ninth of August.

Q Following the June in which she died? A Yes, sir.

Q Where did you live before? A 165 Sussex avenue.

Q Had the two of you lived together? A Since my uncle's death.

Q How long had you and your sister lived together at various places? A We always lived all our lives together.

Q Had you ever gone out to service or work or employment? A No, sir.

Q How were you supported? How did you get your support, your food and clothes, and so forth? A From my sister.

Q Is that true? A That is the truth.

Q I want you to understand. You went to no service? A No.

Q You had no occupation? A No occupation; only household duties at home.

Q What household do you refer to? A Keeping the house clean.

Q For whom? A My sister and myself. I did all the work.

Q You did all the work? A Absolutely.

Q Where did the money come from to buy the meat, coal and pay the gaslight bills, and so forth? A From my sister.

Q How about your clothing? A She always bought my clothes.

Q Is it true that during all the time you never contributed at all towards the expenses of the household or yourself? A It was impossible when I didn't have it; I never went out to work.

Q You had no other income? A No other income.

Q How long had your sister been working at various places? A She was in Bamberger's going on ten years.

Q She went there in 1915? A Yes, sir.

Q Where had she been working before that, if anywhere? A She worked very little up to the time of my uncle's death.

Q The death of your uncle made a difference? A Yes, sir.

Q Now, can you tell us what was her general condition of health, as far as you could observe, down to the sixteenth of January? A She was never sick until the operation.

Q How was she as to sleeping at night, if you know? A Very good; all right.

Q Did you girls sleep together? A Yes, sir.

Q In the same bed? A The same bed.

Q How was she as to her nervousness, if you know? A Do you mean before the accident?

Q Yes. A She never had any nervous trouble.

Q How was her sense of hearing, if you know, before the accident? A Excellent.

Q Did you ever know of her having any trouble with the hearing in her right ear? A No, sir.

Julia T. Ryan, direct.

Q There came a time when you learned of this accident, didn't there? A Yes, sir.

Q When did you hear of it? A Well, I waited for my sister from ten minutes after six until my brother came from the First Precinct to notify me.

Q Did you go from there to the City Hospital? A Yes, sir.

Q Did you see Miss Gertrude there at the hospital? A Yes, sir.

Q Was she conscious or unconscious? A Unconscious when I got there.

Q What time did you get there about? A I got there shortly after eight.

Q I believe she was brought home the next day? A Yes, sir.

Q How long did she remain in bed continuously after that? A For a month in bed.

Q When did she begin going out, walking out? A She didn't go out until March, and then never went out alone.

Q Who was attending to her or waiting upon her when the doctor was not there? Was there any nurse in attendance? A No.

Q Who did wait on her? A I did.

Q Did you continue to sleep with her? A Oh, no, not for a month. I couldn't sleep with her. I stayed in the room with her, in a chair, at the foot of her bed, to watch her.

Q Do you mean you stayed up all night? A I didn't sit up all night; I slept in a chair.

Q What about this chair? Did you stay in that chair all night, do you mean? A She slept with such terrible pain I couldn't lie in bed with her. Did you hear me?

Q Yes. That was for one month? A Yes, sir.

Q Didn't you sleep with her, in the bed with her, at all any part of those nights? A She couldn't stand any one near the bed, she was suffering such pain.

Q Did she complain of it? A She always complained of it. She couldn't stand the pain. If I would go near the bed she would scream with pain.

Q What did you do for sleep during that month? A When some member of the family would come I would get rest during the day.

Q After the first month how was she about sleeping and complaining of pain? A She still had the pain and she could not sleep at all. When I would lie in bed with her at night she used to ask me to stay awake so there would be someone with her.

Q What do you say about her nervous condition? Was she all right, for instance, as far as you could see, after the accident? A She was very nervous after the accident.

Q How had she been before the accident? A She never was nervous.

Q What kind of a sleeper was she before the accident? A Very good.

Q Did she ever go to work or perform any service that you know of from the tenth day of March down to the time of her death? A No, sir.

Q Can you tell us—I do not mean exactly—but can you give us an intelligent estimate as to about how much money your sister contributed to the support of the household. Just answer yes or no without stating the amount? A Yes, sir.

Q Upon what do you base that? How are you enabled to give us an intelligent estimate?

Julia T. Ryan, cross.

A About how much she gave me a week, do you mean?

Q Yes. A She gave me about $12 every week.

Q Would it vary at times? A She paid all the incidental expenses of coal, gas and electric light.

Q Do you recall any other expense she bore beside the living expenses? Were there any expenses in connection with the property which I believe you three owned? A She bought my share and her own share.

Q She paid your bills? A Yes, sir.

Q There was a building and loan mortgage on the property? A A bank mortgage.

Q What did she pay on that property, do you know? A She paid the interest on it.

Q What about the taxes? A She also paid the taxes.

Q The water rent and insurance. Did you have fire insurance? A Yes, sir.

Q Who paid those? A My sister.

Mr. Heisley: There is no doubt about this being the defendant's trolley car?

Mr. Fryling: No.

Cross examination by Mr. Fryling.

Q Gertrude had no other source of income other than her wages from Bamberger's? A Yes, but she did considerable home work.

Q Did you do any home work? A No, sir.

Q Gertrude was about two years younger than you? A About two.

Q How tall are you? A I think I am five foot three.

Q About how much do you weigh? A 116.

Q For about how many years altogether had Gertrude worked away from home? A Well, about twelve years.

Q You never went out to work, did you? A No, sir.

Q Your home consisted of what? A house or part of a house, or what? A A one-family house.

Q You were accustomed to sleeping together in one room, in one bed? A Yes, sir.

Q How many rooms were there in the house? A Six.

Q Did any one else live in the house besides Gertrude and you? A No, sir.

Q Gertrude went out working and earned some money and you stayed home and did all the work around the house? A Yes, sir.

Q That means, I suppose, all the housework and the cooking? A Yes, sir.

Q And you two lived there together? A Yes, sir.

Q Did you talk this arrangement over with Gertrude when you first arranged to plan living this way? A Well, yes.

Q Did you consider that you were fair to your sister in making this arrangement for her to go out and work and for you to take care of the work in the house? A Yes, sir.

Q Did you consider that you were giving her an equal of what she was giving you? A Yes, sir.

Re-direct examination by Mr. Heisley.

Q You spoke of home work. What kind of home work did your sister do? A Needlework art.

Ambrose F. Dowd, direct.

Q Would she sell that? A Yes, sir.

Q I do not suppose you know what she would take in for that? A No.

Q Barring the accident of January sixteenth, do you know of your sister having met with any other accident? A No, sir.

AMBROSE F. DOWD, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q You are a member of the medical profession, I believe? A Yes, sir.

Q Are you in general practice or do you specialize? A Specialize.

Q In what? A Nervous and mental diseases.

Q What school of learning are you a graduate of? A University of Vermont.

Q How long have you been practicing your profession? A Fifteen and a half years.

Q Here in Newark? A Here in Newark.

Q Are you connected with any institutions of the city or county? A With many institutions.

Q Just name them? A Connected with St. James' Hospital, Irvington General, St. Mary's, Bethany Home.

Q You are an ear specialist? A No, just mental diseases.

Q Of course, that applies to injuries, and so forth, to the brain? A Yes, sir.

Q Did you visit Miss M. E. Gertrude Ryan at any time? A Yes, sir.

Q When was that? A June 11, 1924.

Q You saw her, I think, at her house, when she was in bed? A I saw her at her house with Dr. O'Neil.

Q What was her condition at that time? A She was still suffering from a suppurated meningitis.

Q What causes suppurated meningitis? I mean, is it always caused by trauma, or sometimes caused by other diseases? A Suppurated meningitis is caused by the presence of bacteria, a germ, in the meningial.

Q Is it caused sometimes by trauma and sometimes not by trauma? A Trauma plus the presence or occupation of bacteria.

Q You only saw her the one time? A I had seen her later the same day that she went to the hospital. I have no definite recollection of that.

Q Was her condition such that you advised her to go to the hospital? A We did, so she could have a lumbar puncture and it was impossible to do that on her afterwards, because she was delirious.

Q Were you present at the making of the puncture? A No.

Q Assuming that in the early evening of January 16, 1924, a woman aged about thirty-eight years old either fell or was thrown from a moving trolley car upon a paved street with such force that she was rendered unconscious and received a laceration on the right side of the head behind and above the right ear, which laceration was about two inches long and which was duly sutured on the same evening at the hospital, to which she had been immediately taken; that that she had bruises on various portions of her anatomy and she was very nervous and remained in the hospital until the next day, when she

was taken to her home, at which she remained until about the first or middle of March, 1924. That she was under the daily care of a physician, who treated her for her injuries until about the middle of February, 1924, during which time the lacerated scalp was clearing up. That from the time of her removal from the hospital she continuously, and until she lapsed into unconsciousness shortly before her death, which occurred at eleven-thirty in the evening of June 12, 1924, complained of pains in her head and a throbbing and pumping and almost complete deafness in the right ear which caused her to get little sleep either night or day during the months of April and May, or back quite some weeks; that on June 10, 1924, she complained of violent headaches, was very feverish and excited, which condition continued until she became unconscious about noon of the same day; that about June 11, 1924, she was returned to the hospital, but was removed to her home on noon of June 12th to die, within the day, at eleven-thirty, without having regained consciousness; that the autopsy showed no fracture evidence or pleurisy and no pneumonia, but did show a softening of the brain; and admitting that for a long time prior to January 16, 1924, this woman was in a condition of health which enabled her to do regular work in her almost daily attendance as a saleslady in a department store; that before that day, January 16, 1924, she had not had these headaches, and at the time she complained, that she had no pain in her right ear and no throbbing and pumping sensation in her car, and was not restless, nervous or excited, and had no difficulty in securing a normal amount of sleep. Assume that for years before January 16, 1924, she had met with

no accident and received no injury to any portion of her head, and assuming that after January sixteenth she had met with no accident and had received no injuries to her head nor other portions of the anatomy, can you tell us whether or not there was any causal relation between the accident of January 16, 1924, described in this history and the death of this woman? A I think there was a causal relation between the meningitis and her death.

Q Why do you say there was a causal relation? On what do you predicate your opinion? A Upon the development of a suppurated meningitis of a pneumococci origin after the brain injury. The brain injury, perhaps, perfected the medium for the growth of bacteria.

Q Couldn't bacteria get to the brain without the skull being fractured? A Oh, yes, it is due more often without a fracture than with. A fall will usually carry the germs through the blood stream, which may enter through the middle ear or the other sinuses.

Cross examination by Mr. Fryling.

Q The presence of pneumococcus is normal? A Pneumococcus is normal?

Q Yes. A Oh, no, absolutely not. We all have pneumococcus in our nose, throat, and tonsils.

Q Meningitis can happen from other things than trauma? A Oh, my, yes.

Q They happen in the absence of trauma? A Frequently they do. It might happen to any of us without a trauma.

James Elder, direct.

JAMES ELDER, sworn in behalf of the plaintiff.

Direct examination by Mr. Moriarty.

Q What is your occupation? A Chauffeur.

Q By whom are you employed? A City of Newark, Department of Public Works.

Q On or about January 16, 1924, by whom were you employed? A The Mayor of the City of Newark, F. C. Breidenbach.

Q Where were you at about six o'clock of that evening? A Right in front of Proctor's Theatre.

Q Were you riding or walking? A I was in the machine.

Q What happened there? A After I pulled up in front of Proctor's Theatre and I was just going to get out to get some tickets I looked across the street and I seen a form laying in the street.

Q Which way was your automobile facing? A East.

Q That is toward Broad street? A Toward Broad street.

Q You were on the south side of the street? A On the south side of the street.

Q Which side of your car did you get out of? A I didn't get out of the car when it was standing in front of Proctor's.

Q You had the car there, didn't you? A Right in front of Proctor's.

Q Were you in the car or out of the car? A I was in the car.

Q Did you leave the car there? A After I seen the form lying in the street I immediately swung my car around in the car tracks.

Q What caused you to look around in that direction? A I was going to get out of the left-hand side of the car to go in and get tickets.

Q What else did you see at the time you saw the form lying in the street? A When I seen the form lying in the street I deliberately turned around and stopped the car and got out of the car and helped this form into the car, and it was a lady.

Q Was there any one else there at the time who helped you lift Miss Ryan into the car? A There was a young man.

Q Did he get in the car, too? A He got in the back of the car with Miss Ryan and I was driving.

Q What other traffic was on the street at the time? A Why, at the time when I swung around on Market street there was hardly anything on the street at all, outside of a couple of trolley cars going east on Market street.

Q Was there any trolley car going west on Market street? A Yes, there was a Public Service trolley car, Kinney line, that had just passed as I was picking up Miss Ryan. I looked up and I saw a Kinney car going toward Washington street.

Q How far beyond Miss Ryan was that car? A Well, when I saw it it was about crossing the lower section of Washington street, just passing the corner.

Q Did you notice how near the tracks Miss Ryan was lying? A About two feet or two feet and a half, about that distance away from the track.

Q Did you notice anything with respect to the Kinney car and particularly with respect to the rear doors of it, and the rear platform? A They were hanging on the step.

Q (By Mr. Fryling.) You mean the doors were not hanging, you mean the people were hanging on the step? A Yes, the people were hanging on the steps.

Q (By Mr. Moriarty.) Can you tell us whether or not the rear doors were open? A I couldn't see them, but I saw people hanging on the step.

Q Did you see any doors? A I was not attracted to the doors on the car. After I got this woman in the car all I was thinking about was getting her to the hospital, but when I picked up this woman I looked ahead and seen this car with the crowd on the rear.

Q About what time did you get to the hospital? A It must have been about 6:15 or 6:20.

Q Was Miss Ryan conscious or unconscious when you picked her up? A She was unconscious.

Q Was she bleeding? A Well, she must have been bleeding, because there was blood in the car, after we took her out of the car and brought her into the receiving room in the hospital.

Q Did she remain unconscious all the way to the hospital? A Yes, as far as I know, because she was unconscious when we brought her into the hospital.

Cross examination waived.

Mr. Heisley: Is there any question about the identity of Miss Ryan?

Mr. Fryling: No.

Mr. Heisley: I offer in evidence the letters of administration *ad prosequendum* issued by the Surrogate of this County to William P. Ryan in the two cases at issue.

Mr. Fryling: No objection.
(Same are marked Exhibit P. 1.)

PLAINTIFF RESTS.

ELMER CARROLL, sworn in behalf of defendant.

Direct examination by Mr. Fryling.

Q You are employed in the claim department of the Public Service? A Yes, sir.

Q Have you made an effort to locate the conductor of the Kinney line trolley car that was involved in this accident? A I have.

Q Have you been successful in locating him? A No, sir.

Cross examination by Mr. Heisley.

Q What is his name? A Frank Treacy.

Q T-r-a-c-y? A T-r-e-a-c-y.

Q Where did he live while in the employ of your company? A 7 North Sixth street, Newark.

Q Was he a married man? A No.

Q How long had he been in your employ? A That I can't tell you.

Q Don't you keep records of the employment of your men? A Yes, sir.

Q You haven't looked up those records to see? A No, just to find out where I could find him. That's the only record I looked up. I didn't look up the record to see how long he was in service. I looked up his reference, relatives, or anything of that kind.

Q You do not know how long he was in your employ? A I do not.

Q You do not know whether he was a new man or not? A I do not.

Q Are you speaking of the motorman or conductor? A Conductor.

Q He would be the man who was on the rear platform? A Yes, sir.

Q When did he leave your employment? A That I do not know.

Q You said you did not know when the man was employed, and you do not know when he was discharged or when he left your company? A All I was looking for was to find out someone who knew where he was.

Q You did not look at his record at all, then? A Yes, I looked up his references, his relatives.

Q When did you begin making a search for this man, Treacy? A I would say about a month ago.

Q Do you mean to say you people did nothing to find this conductor from January 16th, 1924, until about a month ago?

Mr. Fryling: I object. The witness is only testifying as to what he did himself.

Q You are the man who did it? A I did at the time.

Q You are the investigator, aren't you? A Yes, sir.

Q You are the man who was assigned to this case? A At that time, yes, sir.

Q This accident I presume was reported to the company immediately, wasn't it? A It was, from a reading of the papers.

Elmer Carroll, re-direct.

Q You knew that Miss Ryan had been seriously injured, didn't you? A I knew that, yes, sir.

Q Well, from the 16th of January, 1924, down to a month ago you did absolutely nothing to find this conductor? A I was not called upon to look for him.

Q You did nothing? A I did nothing before a month ago.

Q What did you do in the past month? A Called at the Sixth street address.

Q That is all you did? A No, I found out the family of Treacy had lived there and had moved.

Q Where to? A And that this Frank Treacy lived with his brother.

Q Where did he move to? A 75 North Tenth street. I think that is a brother, and I learned he had left for Detroit or Chicago; they didn't know where he was.

Q How long ago had he left? A Some time ago he had left.

Q A year ago, or how long? A It could have been a year ago, I do not know definitely, and I also wrote to his father in Ireland.

Q You do not think he is over in Ireland, do you? A I don't know.

Q In fact, you know very little about him? A I know very little about Treacy.

Re-direct examination by Mr. Fryling.

Q This claim did not come to you as an employee of the Public Service I take it until you started to get ready for trial? A That is very true.

Q Before claims of this kind come to you for the purpose of preparing them for trial, are the

claims handled by some other department? A Yes, sir.

Q What department is that? A The claim department.

Q I asked you before if you were employed in the claim department? A Well, it is the legal department.

Q Is there a distinction between the general claim department and the department in which you work? A Yes, sir.

Q What department do you work in? A The legal branch.

Q You do not have anything to do with cases until it becomes necessary to get them ready for trial?

Mr. Heisley: I object as leading.

Q (Question withdrawn.)

DEFENDANT RESTS

PLAINTIFF RESTS.

Mr. Fryling: I respectfully move for the direction of a verdict in favor of the defendant in both of these cases. First, in the case of the general administrator, on the ground, it being claimed that the death of Miss Ryan was due to the accident, that the only recovery that can be had is under the provisions of the Death Act.

In the case of the administrator *ad prosequendum* the first ground is that there being this suit pending for the recovery of damages under the survival section of the Executors' Act by the general administrator, that if there was a recovery by the general

administrator, then, there would be no right of action in the administrator *ad prosequendum.*

In both of these cases I move for the direction of a verdict in favor of the defendant on the further grounds that there has not been proof of any negligence on the part of the defendant and that the plaintiff's intestate was guilty of contributory negligence.

(Argument.)

The Court: There is no allegation, I think, in either complaint that the car was started with a sudden lurch. The allegation seems to be that the platform was crowded and an opportunity was not given the deceased, after boarding the car, to get into the car. The only holding part of this complaint is the part which alleges she became a passenger and having become a passenger was not allowed an opportunity to reach a place of safety.

The question of contributory negligence is for the jury.

The question as to the right of the plaintiff in his respective capacities as general administrator and administrator *ad prosequendum* to bring these actions tried together here by consent is disposed of in the case of Soden *vs.* Trenton and Mercer County Traction Company.

I will deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Fryling sums up for the defendant.

Mr. Heisley sums up for the plaintiff.

CHARGE.

The Court charges the jury as follows:

MOUNTAIN, *J.*

There are two causes of action which have been tried together, and they must be distinguished by you when returning your verdicts. One cause of action has been brought by the general administrator of Gertrude Ryan, and he seeks damages for her estate dating from the time of the alleged injuries received at the hands of the defendant to her death; that marks the interval of time. The second suit, under the Death Act, a statute of this State, is an entirely different action brought for pecuniary damages for the benefit of her next of kin, in an action where her brother is administrator *ad prosequendum,* and is totally separate from the other action, as you will see when I charge you. The damages do not overlap, if you properly observe the Court's charge, assuming that you find for the plaintiffs in this case.

Gertrude Ryan, who is represented here by her brother, William P. Ryan, as I have indicated, lived with her sister in this city, and together they lived in a house of six rooms under an agreement by which the sister was to take care of the house and Gertrude was to go to her employment, and apparently furnished the funds. Gertrude had been employed at Bamberger's and was in that company's employ on the 16th day of January, 1924. After her work had been

accomplished that day she started home. It was evidently her purpose to take a Kinney car. Bamberger's, as you know, is on the northeast corner of Washington street and Market street. The Kinney cars, proceeding in the direction in which this young lady desired to go, run west. It is alleged that that particular evening—and it was about six o'clock—was very disagreeable so far as the elements were concerned. It was stormy, raining very hard, and misty.

It is alleged that a Kinney car stopped at the corner I have referred to, and that after it stopped people started to board it. It is alleged that it was a car with a motorman at the front and a conductor in the rear, of a type that I think is not being used now and described particularly with reference to the difference in that type car and the ones that are now in use as having the two doors in the rear. The fare-box was also located on the rear platform.

It is alleged that the people crowded to get into this car as it stood there, and that the doors were open and that the conductor was on the back platform. One of the witnesses called by the plaintiff was on the car with this young lady, he alleged, and he told us that he got on the step and so did she, and that she was standing next to him on his right. That everyone was trying to shove into the car and that he noticed her, after the car was in motion, on the step. To illustrate how the car started, he said the conductor pulled the bell by pulling twice on the bell cord, and that the car went forward with a jerk. He stated that as soon as the car started forward he noticed Gertrude, and he said there were two other girls whom he noticed at the same time, one of whom stepped off and the other

left the car in some way, and then he said that Gertrude slipped off and fell on the back of her skull. He amplified that by testifying that he felt a move and she disappeared, and he further testified that he did not know whether she had been pushed off or stepped off or slipped off.

As the result of that accident she was taken to the hospital, where it was found that she had a wound in her head, which was stitched up. This wound, which was a lacerated wound of the scalp, was above and behind her right ear, and was about two inches long, three stitches being used to suture it. The next day after the accident she was taken home, and there is testimony indicating that from that time until the time of her death she suffered pain, and that this pain varied in intensity, becoming more severe at times. There is testimony tending to indicate that she was nervous during that period.

I think one of the doctors told us that after she was taken home, on the seventeenth day of January, she was in bed a month.

What duty did the defendant owe to her on the day in question and what duty did she owe to herself? If this trolley car, driven by or operated by the defendant, stopped in front of Bamberger's store and in the course of its usual operation, for the purpose of taking on and discharging passengers, opened its doors, that was an invitation to the public or to anyone who desired to be transported by that trolley car to get aboard. Just when such an invitation ceases is usually a question of fact. What I mean is this, that a jury might in some cases, where it is proved that a trolley car has doors and a step which folds up, find that when the conductor or motorman has closed the door and the steps

had folded up that that was equivalent to denying admission to anyone else, and was an indication that the invitation to enter had ceased to exist longer.

There is proof that the rear part of this car was crowded and that people were trying to get into the car. There is proof that after the car went around the turn, a few hundred feet west of Bamberger's into Washington street in a southerly direction, by one witness at least, that there was some room in the front of the car. If the operator or conductor of a trolley car, by some means indicated that he refused admission to any more passengers, and they persisted in getting on, it might be evidence of negligence on their part. For instance, if a motorman closed up a step and shuts the door, and someone nevertheless clambers upon the folded step and clings to the side of the car, a jury might perhaps say that said man or woman was negligent in doing that, because it might be clearly seen that the invitation to get upon the car had been repealed by the closing of the car by the mechanical actions and devices provided by the trolley company.

In this case there is no testimony, that I remember, that the doors were closed. There is testimony that I recall that while people were on the platform and on the steps that the conductor started the car. I can particularize a bit on this subject, because one of the questions presented to you is this: Did Miss Ryan occupy a position on the step of this car with the consent of the defendant? How could they evidence, you may ask, lack of consent? You may find that that could have been done by insisting that those on the step should leave the step, and that the

door or doors should be closed. On the other hand, you may find that they consented to this situation by leaving the door or doors open and accepting the people who were actually on the car as passengers.

It is not negligence *per se,* that is, it is not negligence of itself for anyone to ride on the step of a car. It is notorious that one can ride, not only in the aisle of a car, as well as upon the seats, but on the platform, but at the same time Gertrude Ryan had to exercise ordinary care to look out for herself. She was a young lady, I think about thirty-eight years old, and you have got to determine whether she was negligent in what she did. Whether she was negligent in attempting to get or in getting on the step of the car and in any subsequent act of hers and in that connection if you find that she boarded the car without negligence and by the negligent starting and moving of the defendant's car she was placed in such a position of peril that she was required to form an instantaneous judgment and as a result stepped from the car, it would not have been negligence on her part if, under all the circumstances she did not form the best judgment. Perhaps you will find that she did not step from the car, because there is testimony, as I say, that she either was pushed off or stepped off, or slipped off, or as one witness expressed, "She slipped from next to me."

When one become a passenger on a trolley car the company operating the trolley car owes a high degree of care to transport the passenger, from the time he or she boards the car, until they are properly set down at their destination.

I am going to refer to certain requests to charge, so I will not go into the details of the law

on this point as I wish to avoid surplusage. The burden of proof is, of course, upon the plaintiff in both of these cases to prove by the greater weight of the evidence that the defendant was negligent in the operation and control of its car.

Let us take the first case where the suit is brought by the general administrator. The statute under which that action is brought reads as follows: "That executors and administrators may have an action for any trespass done to the person or property real or personal, of their testator or intestate against the trespasser or trespassers, and recover their damages in like manner as their testator or intestate would have had if he or she was living." This first action brought by the general administrator is brought for the benefit of the decedent's estate, and the plaintiff is entitled to recover in that action, if you find that the plaintiff is entitled to recover as a matter of fact, damages for the pain and suffering which Gertrude Ryan had and which proximately resulted from the negligence, if any, of the defendant and not from any other cause. There was testimony that she died of a suppurated meningitis caused by trauma, that is, caused by violence, and there was testimony that there was a casual connection between this meningitis which took place in her head and the injury in question. Apparently, from the description given by the physicians, this meningitis results from the presence in a localized area of micro-organisms or bacteria, which produce pus. The testimony is that these bacteria may find their way to that area just as easily in the blood stream as by virtue of some infection. One of the elements of the damages in addition to the pain and suffering which the plaintiff in the first

action can recover, is such a reasonable amount as he has spent or is obligated to spend for doctors' fees to cure or alleviate injuries to Gertrude Ryan caused by negligence of the defendant. The testimony was that Dr. Potter had charged three dollars for an examination of the decedent for the purpose of ascertaining if he could successfully treat her ear. Then, there is the testimony of her attending physician that his bill was $210. Let us turn now to the second action, the one that is brought under the Death Act. That action, as I have indicated by the statute, contemplates the award of no damages except pecuniary damages. It is an unusual statute, because under the second section you can award no damages for pain or suffering or distress, or anything of that kind. What would be a reasonable, fair and just estimate of the probable sum which, if Gertrude Ryan had lived would, during the joint lives of herself and next of kin, have come to them from her. Having formed an estimate of that amount, whatever you decide it might be, you will of course find that it is rather speculative. There is testimony in the case that Gertrude living, as I have said, with her sister under the agreement that has been testified to, earned seventy-five dollars a month. Her sister received, as she testified, twelve dollars a week. The sister also testified that Gertrude, the deceased, paid all the incidental expenses for coal and gas and electric light as well as the interest on the mortgage, taxes, water rent and insurance.

Of course, it is speculative, but insurance companies and other business enterprises have to indulge in these calculations and you must in this case. You have to consider the age and condition of the deceased, and how long she would

have lived. She might have died the next day, or the next year, and then this money would have stopped flowing from her to her sister or next of kin. Her sister might not survive a great while and yet might live to a ripe old age. When you have determined the amount that I have indicated then, if you will stop for a moment, you will realize that it is too large, because it contemplates the entire amount that would be paid to the next of kin for the entire period of years that you have in mind, whereas, it should be some capital fund, or in other words, that amount which you first found should be commuted to the present value of the future expectation and that is the sum which the administrator, in the second action, is entitled to recover, if he is entitled to recover anything.

I have shortened this charge somewhat because of the requests that I am going to read on behalf of the plaintiff, but before I read those let me say this to you, that if you find that Gertrude Ryan was negligent in attempting to board this car or in any act of hers in regard thereto and that her negligence contributed to her injuries, the plaintiff cannot recover in either action.

I am asked to charge by the plaintiff and do charge you as follows:

"1a. If a person is in the act of boarding a street car, standing in a public street for the receiving of passengers, it is negligence for those in control of the car to start it in motion without giving such person any notice of their intention to so start it."

"1b. If this car was standing on its tracks on Market street and with its doors open, such facts constituted an invitation for the deceased

to embark upon it and the deceased had a right to assume that the car would not be moved without warning or notice to her while she was openly and expeditiously trying to board it."

"2a. A common carrier of passengers must use a high degree of care to protect them from dangers that foresight can anticipate."

"2b. By 'foresight' is meant, not foreknowledge absolute, not that exactly such an accident as has happened was expected or apprehended, but, rather, that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent."

"3. The crowding of a trolley car, and especially of those parts of it that are used for entrance and exit, is attended with a liability to danger that the carrier should anticipate, and employ care to avert."

"4. A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride with expressed or implied consent of the company."

"5. It is not negligence *per se* for the passenger to ride upon the step of the platform of an electric street railway car."

The sixth will be denied.

"7. Even, although the platform and steps were crowded but the car remained motionless with its doors open, the deceased would not necessarily be negligent in attempting to embark unless it was obvious to her that there was no space or room for her in the interior of the car."

The eighth I will charge but change.

"8. From the moment deceased stepped upon the standing car with its door open and you find she became a passenger the defendant owed her a high degree of duty and care to protect her from any injury that would probably be inflicted upon her by the negligent starting or the operation of its car under such circumstances."

"9. If the platform and steps were crowded and the doors open and the car motionless, it is for you to say whether it was reasonably safe and proper for the defendant to start or move its car under such circumstances."

"10. If it was obvious to the conductor or other person in charge of said car that passengers were standing on a crowded platform and steps and liable to be thrown therefrom by the car starting or being in motion, it was the duty of the defendant to exercise care reasonably commensurate with the dangers that such conditions created, and if it failed to perform such duty and by reason of such failure the deceased was thrown from the car, your verdict must be for the plaintiff unless it appears by the weight of evidence that the deceased was guilty of contributory negligence."

"11. If the deceased was in the act of embarking on the car, and it was obvious to the conductor she was doing so, and was not in a place of usual and comparative safety owing to the platform and steps being crowded with persons, and if the car under such conditions then started with the doors open, and if it was obvious to the conductor that starting the car under such circumstances and with an open door

would subject unnecessarily the deceased to danger of being thrown from the car, it would be negligence upon the part of the company to start the car under such conditions, and if you find that such negligence was the proximate cause of her injuries, the defendant must respond in damages unless she was guilty of contributory negligence."

"12. Contributory negligence is a defense to be proven by the defendant unless it affirmatively appears as a part of the plaintiff's case."

The thirteenth I will deny, because I think it should properly include the statement as to just how she got upon the car; in other words, one of the elements is missing.

The fourteenth, fifteenth, will be denied.

The sixteenth I will deny, because I think I have covered it. The seventeenth, eighteenth, will be denied. The nineteenth and twentieth will be denied because I have covered those.

The twenty-first I will charge, but change:

"The first-mentioned action, the action brought by the general administrator, is brought to recover damages suffered by decedent's estate in the interval between the injury to decedent and her death."

The twenty-second I will charge but change:

"The second-mentioned action I have indicated was brought under the Death Act and was brought to recover damages for the pecuniary injuries resulting from the decedent's death to her next of kin."

Charge to Jury.

"23. If you find that the Public Service Railway Company, by its agents or servants, was negligent and that such negligence was the proximate cause of decedent's injuries and that decedent was not guilty of contributory negligence, your verdict in the first-mentioned case should be in favor of the plaintiff, William P. Ryan, administrator of the estate of M. E. Gertrude Ryan, deceased; and, if in addition to such findings you find that decedent's death resulted from her said injuries so sustained, and that her death resulted in pecuniary injury to her next of kin, your verdict in the second-mentioned case should be in favor of the plaintiff, William P. Ryan, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased."

The twenty-fourth and twenty-fifth I will deny as I have charged them.

The twenty-sixth I will charge: "The statute—that is, the Death Act, the second case, as I have indicated them on the blackboard—does not require the plaintiff to show that the next of kin would probably have received from the deceased contributions of money or of things purchased with money. The word 'pecuniary' in the statute was not used in a sense so limited as to confine it to the immediate loss of money or property; for if that were so there is scarcely a case where any amount of damages could be recovered. It looked to prospective advantages of a pecuniary nature, which have been cut off from the premature death of the person to whom they would have proceeded."

"27. Any relations as a result of which the next of kin have a reasonable expectation of pecuniary benefit from the continuance of the

life of the deceased are included in the purview of the statute."

Again referring to the second statute which I have denominated as the Death Act.

My attention was called to the fact there is one element of damages which you can consider under the first case, that is under the general administrator's claim, which I omitted, and that is the claim made for damages in the interval of time between the accident and the death of the girl. That element is any pecuniary damage which she may have sustained by reason of her inability to attend to her business as a saleslady at Bamberger's through the negligence of the defendant. We have testimony indicating that she was making $75 a month. That would be only applicable to the first case of the general administrator.

THE JURY RETIRES.

Mr. Fryling: I respectfully pray an exception to that part of your Honor's charge wherein your Honor said, referring to the suit of the general administrator, that if the plaintiff is entitled to recover he would be entitled to recover damages for the pain and suffering which the deceased suffered, on the ground that the only possible construction of the statute is or should be if entitled to recover at all would only be the financial loss to the estate.

Exception noted as ground of appeal.

Mr. Fryling: I respectfully pray an exception to that part of the charge in which the Court said in that suit that if there was a right to recover there may be a recovery for doctors'

fees, and the last thing the Court said referring to the loss of earnings.

Exception noted as ground of appeal.

Mr. Fryling: I respectfully pray an exception to that part of your Honor's charge which refers to the Death Act in saying that if the plaintiff was entitled to recover he would be entitled to recover what came to the sister during the joint lives of the next of kin and the deceased, the earnings used there that would have come to them from her. My objection to that is it seems to me that the jury might be led astray by that because of the testimony that the sister paid a certain amount of money perhaps to the next of kin, and the benefit was used for the benefit of the deceased as well as the rest.

Exception noted as ground of appeal.

Mr. Fryling: I respectfully pray an exception to that part of your Honor's charge in which your Honor said, "Her sister received $12 a week." My objection to that is along the same line, for the reason that the deceased contributed $12 a week towards the maintenance of the home used for the joint use of both of them.

Exception noted as ground of appeal.

Mr. Fryling: Then I respectfully pray an exception to the plaintiff's requests to charge as charged by the Court, No. 1a, 1b, 3, 7, 8, 11, 23 and 26.

Exception noted as ground of appeal.

Mr. Heisley: I respectfully pray an exception to your Honor's refusal to charge the certain requests of the plaintiff which your Honor refused to charge and to the modification of such other requests.

Exception noted as ground of appeal.

Exceptions to Charge.

Mr. Heisley: I respectfully pray an exception to that portion of your Honor's charge where you said to the jury in effect that if M. E. Gertrude Ryan was guilty of negligence—my thought being there was no evidence whatsoever from which the jury could find contributory negligence.

The Court: I think it was a jury question as to whether she was not negligent in trying to board a car as crowded as this was.

Mr. Moriarty: I respectfully pray an exception to that part of the Court's charge where the Court in effect stated to the jury "that when the doors were opened the decedent was invited teo board the car," because the invitation or termination of the invitation is a question of fact when the doors were opened.

Exception noted as ground of appeal.

Mr. Moriarty: I respectfully pray an exception to that part of the Court's charge where the Court said in effect that it was a question to be presented to the jury and to be determined by them as to whether the decedent occupied a position on the step with the consent of the defendant.

Exception noted as ground of appeal.

Mr. Moriarty: I respectfully pray an exception to the Court's charge in which the Court said in effect to the jury that the decedent had to exercise ordinary care under the circumstances of the case to look out for herself and that the jury would have to determine whether or not she was negligent.

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

1a. If a person is in the act of boarding a street car, standing in a public street for the receiving of passengers, it is negligence for those in control of the car to start it in motion without giving such person any notice of their intention to so start it. CHARGED.

1b. If this car was standing on its tracks on Market street and with its doors open, such facts constituted an invitation for the deceased to embark upon it and the deceased had a right to assume that the car would not be moved without warning or notice to her while she was openly and expeditiously trying to board it.

CHARGED.

2a. A common carrier of passengers must use a high degree of care to protect them from dangers that foresight can anticipate.

CHARGED.

2b. By "foresight" is meant, not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but, rather, that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. CHARGED.

3. The crowding of a trolley car, and especially of those parts of it that are used for entrance and exit, is attended with a liability to danger that the carrier should anticipate, and employ care to avert. CHARGED.

4. A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and

upon whatever part of the car they ride with expressed or implied consent of the company.

CHARGED.

5. It is not negligence *per se* for the passenger to ride upon the step of the platform of an electric street railway car. CHARGED.

6. A motionless electric street car standing in a public street with its door open is usually in law an invitation for persons to enter it.

DENIED.

7. Even, although the platform and steps were crowded but the car remained motionless with its door open, the deceased would not necessarily be negligent in attempting to embark unless it was obvious to her that there was no space or room for her in the interior of the car.

CHARGED.

8. From the moment deceased stepped upon the standing car with its door open, and you find she became a passenger, the defendant owed her a high degree of duty and care to protect her from any injury that would probably be inflicted upon her by the negligent starting or the operation of its car under such circumstances.

CHARGED.

9. If the platform and steps were crowded and the doors open and the car motionless, it is for you to say whether it was reasonably safe and proper for the defendant to start or move its car under such circumstances. CHARGED.

10. If it was obvious to the conductor or other person in charge of said car that passengers were standing on a crowded platform and steps and liable to be thrown therefrom by the car starting or being in motion, it was the duty

of the defendant to exercise care reasonably commensurate with the dangers that such conditions created, and if it failed to perform such duty and by reason of such failure the deceased was thrown from the car, your verdict must be for the plaintiff unless it appears by the weight of evidence that the deceased was guilty of contributory negligence. CHARGED.

11. If the deceased was in the act of embarking on the car, and it was obvious to the conductor she was doing so and was not in a place of usual and comparative safety owing to the platform and steps being crowded with persons, and if the car, under such conditions, then started with the doors open, and if it was obvious to the conductor that starting the car under such circumstances and with an open door would subject unnecessarily the deceased to danger of being thrown from the car, it would be negligence upon the part of the company to start the car under such conditions, and if you find that such negligence was the proximate cause of her injuries the defendant must respond in damages unless she was guilty of contributory negligence. CHARGED.

12. Contributory negligence is a defense to be proven by the defendant unless it affirmatively appears as a part of the plaintiff's case. CHARGED.

13. Contributory negligence is not presumed but must be proven, and if you find from the evidence that the deceased was in a place that was dangerous for her to remain in and that she could not get in the car or to a safer place, and if it reasonably appeared to her that to remain where she was would probably result in throw-

ing her from the car when it started, and particularly if she knew that the car would very quickly be passing around a curve, and under such circumstances she stepped off of the moving car, that fact of itself would not necessarily constitute negligence upon her part. DENIED.

14. If under the circumstances stated she stepped from the moving car, it is for you to say whether or not in doing so she was acting with that degree of care that a reasonably prudent person mindful of her own welfare would exercise under such circumstances. DENIED.

15. If you find that because of the starting and movement of the car under such circumstances she was placed in a position of peril or danger of receiving serious injury, and she was required to form an instantaneous judgment, and as a result thereof stepped from the car, it would not be negligence upon her part if under such circumstances she did not form the very best judgment. DENIED.

16. There are two separate and distinct actions being tried before you and you should render two separate and distinct verdicts—one in the case of William P. Ryan, administrator of the estate of M. E. Gertrude Ryan, deceased, plaintiff, vs. Public Service Railway Company, a corporation, defendant, and the other in the case of William P. Ryan, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, plaintiff, vs. Public Service Railway Company, a corporation, defendant. DENIED.

17. The first-mentioned action is brought under the fourth section of "An Act concerning executors, and the administration of intestate's estates."

Plaintiff's Requests to Charge.

"That executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser or trespassers, and recover their damages in like manner as their testator in intestate would have had if he or she was living." DENIED.

18. The second-mentioned action is brought under "An Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default." DENIED.

19. The first-mentioned action is brought for the benefit of decedent's estate. CHARGED.

20. The second-mentioned action is brought for the benefit of decedent's next of kin. CHARGED.

21. The first-mentioned action is brought to recover damages suffered by decedent's estate in the interval between the injury to decedent and her death. CHARGED.

22. The second-mentioned action is brought to recover damages for the pecuniary injury resulting from decedent's death to her next of kin. CHARGED.

23. If you find that the Public Service Railway Company, by its agents or servants, was negligent and that such negligence was the proximate cause of decedent's injuries, and that decedent was not guilty of contributory negligence, your verdict in the first-mentioned case should be in favor of the plaintiff, William P. Ryan, administrator of the estate of M. E. Gertrude Ryan, deceased; and, if in addition to such find-

ings you find that decedent's death resulted from her said injuries so sustained, and that her death resulted in pecuniary injury to her next of kin, your verdict in the second-mentioned case should be in favor of the plaintiff, William P. Ryan, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased. CHARGED.

24. If you find for the plaintiff in the first-mentioned case, you should, in making up your verdict, award damages for any pain and suffering the decedent suffered, for any loss of earnings and for any expense incurred by her for physicians and medicines, because of her injuries, and proximately resulting from defendant's negligence. CHARGED.

25. If you find for the plaintiff in the second-mentioned case, you should, in making up your verdict, award such damages as you shall deem fair and just with reference to the pecuniary injury resulting from such death to the next of kin of the decedent. CHARGED.

26. The statute does not require the plaintiff in the second-mentioned action to show that the next of kin would probably have received from the deceased contributions of money or of things purchased with money. The word "pecuniary" in the statute was not used in a sense so limited as to confine it to the immediate loss of money or property; for, if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded.

CHARGED.

Exhibit P. 1.

27. Any relation as a result of which the next of kin have a reasonable expectation of pecuniary benefit from a continuance of the life of the deceased are included in the purview of the statute.

CHARGED.

EXHIBIT P. 1.

STATE OF NEW JERSEY.

ESSEX COUNTY SURROGATE'S COURT.

I, Howard Isherwood, Surrogate of the County of Essex, do certify that on the twenty-fifth day of November, in the year of our Lord, one thousand nine hundred and twenty-four, ADMINISTRATION AD PROSEQUENDUM was granted by me to William P. Ryan, of the County of Essex, for the purpose of enabling him to prosecute an alleged claim of the next of kin of M. E. Gertrude Ryan, late of the County of Essex, against Public Service Railway Company, who, it is alleged, caused the death of the said M. E. Gertrude Ryan by its wrongful act, neglect or default.

WITNESS MY HAND AND SEAL OF OFFICE, the 25th day of November, in the year of our Lord, one thousand, nine hundred and twenty-four.

HOWARD ISHERWOOD,

(SEAL) Surrogate.

Exhibit P. 1.

STATE OF NEW JERSEY.

ESSEX COUNTY SURROGATE'S COURT.

I, Howard Isherwood, Surrogate of the County of Essex, do certify that on the 26th day of June, in the year of our Lord, one thousand nine hundred and twenty-four, ADMINISTRATION of all and singular the goods and chattels, rights and credits which were of M. E. Gertrude Ryan, late of the County of Essex, who died intestate, was granted by me to William P. Ryan, of the County of Essex, who is duly authorized to administer the same agreeably to law.

WITNESS MY HAND AND SEAL OF OFFICE, the 26th day of June, in the year of our Lord, one thousand nine hundred and twenty-four.

HOWARD ISHERWOOD,

(SEAL) Surrogate.

GROUNDS OF APPEAL.

Filed March 27, 1926.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM P. RYAN, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, *Plaintiff-Appellee,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from the New Jersey Supreme Court.*

To Messrs. Grosken and Moriarty, attorneys of plaintiff-appellee.

SIRS:

TAKE NOTICE that the following are the grounds of appeal which the defendant-appellant will urge why the judgment heretofore rendered against it in the above-entitled cause should be reversed, set aside, and for nothing holden:

1. Because the Court, at the close of the case, although requested so to do by the attorney of the defendant, refused to direct a verdict in favor of the defendant.

2. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "If a person is in the act of boarding a street car, standing in a public street for the receiving of passengers, it is negligence for those in control of the car to start it in motion without giving such person any notice of their intention to so start it."

3. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "If this car was standing on its tracks on Market street and with its doors open, such facts constitute an invitation for the deceased to embark upon it and the deceased had a right to assume that the car would not be moved without warning or notice to her while she was openly and expeditiously trying to board it."

4. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "Even, although the platform and steps were crowded but the car remained motionless with its doors open, the deceased would not necessarily be negligent in attempting to embark unless it was obvious to her that there was no space or room for her in the interior of the car."

5. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "From the moment deceased stepped upon the standing car with its door open and you find she became a passenger the defendant owed her a high degree of duty and care to protect her from any injury that would probably be inflicted upon her by the negligent starting or the operation of its car under such circumstances."

6. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "If the deceased was in the act of embarking on the car, and it was obvious to the conductor she was doing so and was not in a place of usual and comparative safety owing to the platform and steps being crowded with persons, and if the car under such conditions then started with the doors open, and if it was obvious to the conductor that starting the car under such circumstances and with an open door would subject unnecessarily the

deceased to danger of being thrown from the car, it would be negligence upon the part of the company to start the car under such conditions, and if you find that such negligence was the proximate cause of her injuries, the defendant must respond in damages unless she was guilty of contributory negligence.''

Yours truly,

JOSEPH COULT,
Attorney of Defendant-Appellant.

Dated: March 22, 1926.

(Acknowledgement of service endorsed on original.)

GROUNDS OF APPEAL.

Filed March 27, 1926.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM P. RYAN, administrator of the estate of M. E. Gertrude Ryan, deceased, *Plaintiff-Appellee,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from the New Jersey Supreme Court.*

To Messrs. Grosken and Moriarty, attorneys of plaintiff-appellee.

SIRS:

TAKE NOTICE that the following are the grounds of appeal which the defendant-appellant will urge why the judgment heretofore rendered against it in the above-entitled cause should be reversed, set aside, and for nothing holden:

1. The Court, despite the objection of the defendant-appellant, permitted Charles L. O'Neil a witness produced by the plaintiff-appellant, to testify as follows: "Q Doctor, you say she complained of pain in her head and this puffing and other noises. Will you tell us from your medical experience, if you can, what kind of pain would an injury of that character, that is to say, the cause of a fall from a trolley car on a stone pavement, what kind of a pain would a person receive from such an injury, dull, soft or what kind of a pain? Describe the intensity,

the degree of intensity. A It will be a severe pain."

2. Because the Court, at the close of the case, although requested so to do by the attorney of the defendant, refused to direct a verdict in favor of the defendant.

3. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "This first action brought by the general administrator is brought for the benefit of the decedent's estate, and the plaintiff is entitled to recover in that action, if you find that the plaintiff is entitled to recover as a matter of fact, damages for the pain and suffering which Gertrude Ryan had and which proximately resulted from the negligence, if any, of the defendant and not from any other cause."

4. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "If a person is in the act of boarding a street car, standing in a public street for the receiving of passengers, it is negligence for those in control of the car to start it in motion without giving such person any notice of their intention to so start it."

5. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "If this car was standing on its tracks on Market street and with its doors open, such facts constituted an invitation for the deceased to embark upon it and the deceased had a right to assume that the car would not be moved without warning or notice to her while she was openly and expeditiously trying to board it."

6. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "Even, although the platform and steps were crowded but the car remained motionless with its

doors open, the deceased would not necessarily be negligent in attempting to embark unless it was obvious to her that there was no space or room for her in the interior of the car."

7. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "From the moment deceased stepped upon the standing car with its door open and you find she became a passenger the defendant owed her a high degree of duty and care to protect her from any injury that would probably be inflicted upon her by the negligent starting or the operation of its car under such circumstances."

8. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows: "If the deceased was in the act of embarking on the car, and it was obvious to the conductor she was doing so and was not in a place of usual and comparative safety owing to the platform and steps being crowded with persons, and if the car under such conditions then started with the doors open, and if it was obvious to the conductor that starting the car under such circumstances and with an open door would subject unnecessarily the deceased to danger of being thrown from the car, it would be negligence upon the part of the company to start the car under such conditions, and if you find that such negligence was the proximate cause of her injuries, the defendant must respond in damages unless she was guilty of contributory negligence."

Yours truly,

JOSEPH COULT,
Attorney of Defendant-Appellant.

Dated: March 22, 1926.

(Acknowledgment of service endorsed on original.)

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM P. RYAN, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, *Plaintiff-Appellee,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*
WILLIAM P. RYAN, administrator of the estate of M. E. Gertrude Ryan, deceased, *Plaintiff-Appellee,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF OF DEFENDANT-APPELLANT.

These two actions to recover damages for injuries sustained through the alleged negligence of the defendant to M. E. Gertrude Ryan resulting in her death, and for damages sustained by the death to the next of kin through the same alleged negligent act, were tried together in the Supreme Court at the Essex Circuit, and resulted in a verdict in favor of the administrator *ad prosequendum* for the death in the sum of $4,500 (p. 9 of the book), and in a judgment in favor of the administrator of the estate in the sum of $3,588 (p. 16). The plaintiff, William P. Ryan, was administrator *ad prosequendum* of M. E. Gertrude Ryan, de-

ceased, as well as general administrator, and in the two suits sought to recover damages for injuries and death. He alleges that on January 16, 1924, decedent boarded a trolley car of the defendant on Market street near the corner of Washington street, and that while a passenger, standing at the rear end thereof, defendant, by its agents and servants, negligently and unskillfully managed and operated its car in that it then and there permitted and allowed the rear end of said car to become and remain overcrowded with a large and excessive number of persons; and permitted and allowed the rear end of said car to become and remain overcrowded, and, thereby impeded the progress of decedent toward the body of said car; and in that while she was so a passenger standing at the rear end thereof, and while the rear end of said car was so overcrowded with a large and excessive number of persons and while her progress toward the body of the car was impeded, the defendant then and there started the said car in motion and ran and operated the same in a westerly direction along Market street in Newark, without first affording decedent an opportunity to reach a place of safety; and in that while so starting, running and operating said car the defendant allowed the doors at the rear to remain open, and before so starting or running and operating said car did not afford decedent an opportunity to reach a place of safety, and did not provide proper safeguards or make adequate provision for the safety and security of the decedent; that by reason of said alleged acts decedent was forced and thrown from the car to the pavement on Market street, was severely injured, and as a result thereof died on June 12, 1924. (See complaint p. 3) Alleg-

ing the same acts of negligence the general administrator in his complaint (p. 13) alleges decedent was unable to attend to her business for a long time whereby she lost large sums of money, and she suffered and underwent great pain and was permanently disabled and hindered and prevented for a long time from attending to her business, and thereby lost her earnings for a long time, and expended large sums of money for medical and surgical attendance, nurse's attendance and medicine because of said injuries.

The grounds of appeal are the same in both actions excepting that in the action brought by the general administrator the first and third grounds apply to that action only (pp. 125-126) and those grounds will be argued first and together because they involve the same question of law.

Grounds Nos. 1 & 3 (pp. 125-126).

Dr. Charles L. O'Neil, a witness produced by the plaintiff (p. 62) was permitted to ask the following question over objection by the attorney for the defendant; an exception was taken (p. 71),— "Q Doctor, you say she complained of pain in her head and this puffing and other noises. Will you tell us from your medical experience, if you can, what kind of pain would an injury of that character, that is to say, the cause of a fall from a trolley car on a stone pavement, what kind of a pain would a person receive from such an injury, dull, soft or what kind of a pain? Describe the intensity, the degree of intensity. A It will be a severe pain."

On the same subject the court charged the jury as follows (p. 104):

> "This first action brought by the general administrator is brought for the benefit of the decedent's estate, and the plaintiff is entitled to recover in that action, if you find that the plaintiff is entitled to recover as a matter of fact, damages for the pain and suffering which Gertrude Ryan had and which proximately resulted from the negligence, if any, of the defendant and not from any other cause."

To this portion of the charge the defendant's counsel took an exception (p. 111). The award of the sum of $3,588 to the general administrator is clearly arrived at (p. 105) by allowance for attendance of Dr. Potter $3, for attending physician $210, and (p. 111) for lost earnings $375, which leave a balance of $3,000 for which there was no proof of damages, and which the jury undoubtedly awarded as compensation for pain and suffering.

This court in *Soden* v. *Trenton and Mercer County Traction Co.*, 127 Atl. Rep. 558, 3 Adv. Rep. 409, has held that two actions may be maintained; one for damages sustained by the death of the next of kin, and another for damages for trespass to person or property of decedent under act of March 17, 1855, (2 Comp. Stat. 1910, p. 2260, par. 4). In the Soden case, however, the plaintiff (there being only one suit, the plaintiff being an executor) in the first count of the complaint sued for moneys expended between the date of the accident and the death of the testator as damages sustained by the estate, and in the second count for the pecuniary loss by the next of kin from the death itself. There was no contention on the part

of the plaintiff that he was entitled to recover anything for pain and suffering. Justice Lloyd in writing the opinion said,—

> "It is in the interval between injury and death only that loss can accrue to the estate, and in that alone is the personal representative interested. In this the Death Act gives no participation by the widow or next of kin. The expense of care, nursing, medical attendance, hospital, and other proper charges incident to an injury, as well as the loss of earnings in the lifetime of the deceased, are the loss to his estate and not to them."

The right to recover damages by the general administrator is rested on the act of March 17, 1855 (2 Comp. St. 1910, p. 2260), the 4th section of which enacts,—

> "That executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser or trespassers, and recover *their* damages in like manner as their testator or intestate would have had if he or she was living."

It will be noted that the act refers to *their* damages, which, undoubtedly, means the damages of the executors and of the administrators.

The defendant contends that where death is the result of alleged trespass the recovery for injuries between the alleged trespass and the death are limited to the damages of the executors and administrators, which in the cases at bar are the medical expenses and lost earnings; that, therefore, the trial court improperly admitted the testimony objected to as to the

nature of the pain and suffering of decedent, and improperly charged the jury that the general administrator was entitled to recovery for such pain and suffering. Because of these errors the jury awarded the general administrator the sum of $3,000 for decedent's pain and suffering sustained by her from the date of the accident, January 16, 1924, to the date of her death June 12, 1924. By reason of such harmful error the judgment in favor of the general administrator should be set aside and a new trial granted.

Ground No. 1 (p. 122)

Ground No. 2 (p. 126)

At the close of the whole case the defendant's attorney moved for the direction of verdicts in favor of the defendant in both actions, which the trial court refused to do (p. 98), and an exception was taken.

Harry W. Rowitz, a witness called by the plaintiff (p. 24), says that the accident in question happened (p. 25) at six o'clock in the evening of a stormy night, the wind blowing hard and the rain was pouring; that he was standing in the entrance of Bamberger's store in Market street, which is at the northeast corner of Washington street; that a westbound Kinney car came to a standstill in front of Bamberger's entrance; and that he went out to board it; that there was a crowd getting on, and he had no umbrella (p. 26), the crowd was moving slowly, the platform was crowded so he went back to the entrance of the store. He later turned around, the car was going on its way and he saw a lady (plaintiff's decedent) lying on the ground near the car tracks. He did not see her (decedent) (p. 32, l. 22) as he was wait-

ing to get on the car. As a matter of fact (p. 34, l. 28) he was not acquainted with her. When he saw her lying on the ground (p. 34, l. 12) she was lying at about the place where the people had been getting on the car. The car, when he first saw her, was in motion and had proceeded about six feet west of where she lay.

Benjamin Friedman, a witness called by the plaintiff, (p. 47) says that at the time of the accident he was employed at Bamberger's store (p. 48); that the night was very stormy; that it was raining very hard, and misty. From his story he apparently knows little of how the accident actually happened. He was on the step of the back platform of the trolley car. The doors were open. Sometime or other before the accident happened he says Miss Ryan was on the step with him (p. 48, l. 27). He says,—"I *think* she was up ahead of me, in fact there was so many people trying to crowd in that trolley I didn't know exactly who was around me. I do know there was a woman in front and a couple of men in back and all trying to shove in the platform." Again he says (p. 49, l. 30),—"When she was on the step and these two young ladies were on the step and you were on the step at that time, was the car moving or standing? A The car was moving at that time, when I turned around and noticed who was standing on the step with me." And again (p. 50, l. 3) testified,—"Q Do you know whether the car started before or after these girls, including Miss Ryan, were on this lower step with you? Did it start before or after you noticed them? A I noticed after the car was on the move who was next to me. I noticed that when the car was on the move; I couldn't notice that before when the car was at a stand-

still because there was so many people around there." And (p. 50, l. 16)—"When I first saw her she was on the step. Q At that time the car was moving? A Yes, sir." And again (p. 51, l. 34)—"Well, I will start at the beginning where I tried to get on the trolley car, and I was shoving with the rest of the people on the trolley car and the people in back of me and in front of me were all trying to shove on the trolley car and this conductor didn't give any warning at all.—(p. 52) he rang the bell. Q How do you know? A I saw him ring it and distinctly heard the bell. (p. 52, l. 27) Q Had you seen Miss Ryan before you saw the conductor pull the bell or not? A No, sir."

This witness under cross examination (p. 55, l. 17) says that he did not know Miss Ryan. He, with about 15 or 20 people tried to get on the trolley car when it pulled up in front of Bamberger's; that he was not one of the last to get on; that there were others in back of him; that (p. 59, l. 10) he stood on the middle of the rear step facing toward the inside of the car, decedent at his left toward the rear of the car and two girls to his right, all four on the step; that (p. 60, l. 26) the two ladies that stood to his right voluntarily stepped off the car, and one of them fell in a sitting position. When he was asked (p. 61, l. 25) more particularly as to just what he saw of the decedent he stated that "as a matter of fact I did not happen to see her at all. All I know it was a lady on my left-hand side." (p. 61, l. 8) He did not know whether she was facing towards the front, rear, outside or inside of the car, and during the time that she was there there was crushing and crowding and she disappeared off the step, and he was asked (p. 62, l. 13) "Q She disap-

peared off the step? A I felt a move on my left-hand side and saw her fall. Q You do not know whether she stepped off or slipped off or was pushed off, do you? A No, sir." He did not know when it was she disappeared from the step as regards the time when the conductor rang the bell and the car started. As a matter of fact he did not know whether it was at that time, before that time, or afterwards, or when.

The testimony of these two witnesses is the only evidence produced at the trial as to the manner in which the accident happened. Plaintiff's decedent upon this rainy and blustery night, with everybody pushing and crowding in a mad rush to get on this trolley car, may have made an effort to board the car after it had started; she may have been negligently pushed off the car by some other passenger in his or her mad rush to board the car, or may have met with her accident in some other way not explained in so far as any evidence in the trial is concerned. She may have been injured due to a cause with which the defendant was not connected.

In the case of *Maher* v. *Magnus,* 99 N. J. L. 514, this court said:

> "In the absence of direct evidence the plaintiff must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and exclude the idea that it was due to a cause with which the defendant was unconnected."

In the case of *McCombe* v. *Public Service Railway Company,* 95 N. J. L. 187, decided by this court, plaintiff's intestate was discovered about

midnight, by the motorman of an approaching electric car, on the tracks of the defendant company, near the bridge over the Hackensack River on the Newark Plank Road, Jersey City, with one arm and leg cut off sharply. The court said:

> "There was no eyewitness to the accident. No one saw how it happened. * * * In this situation, the trial judge was called upon to say, whether any facts had been established, from which negligence may be reasonably inferred. * * * But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. Price *v.* New York Central R. R. Co., 92 *Id.* 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. 29 Cyc. 589; Bien *v.* Unger, 64 N. J. L. 596. * * *

In the case of *Alvino* v. *Public Service Railway Company,* 97 N. J. L. 526, also decided by this court and referred to in the decision in the Ryan case, the court said,—

> "It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car; but, if so, how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

In the *Alvino* case the charge laid in the complaint is the defendant company on the 3rd day of July, 1919, negligently caused its trolley car to collide with a motorcycle, in the sidecar of

which the decedent was riding, thereby causing his death. The syllabus reads as follows:

> "To establish a case of negligence and fix the liability of the defendant, it is incumbent on the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it. When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail. A probability is not sufficient. The rule applied to a case of an alleged collision between a motorcycle and a trolley car, in which no witness was called, who either saw or heard a collision, prevents a recovery by the plaintiff. For the facts of the case, see the body of the opinion.
>
> "Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence and in favor of innocence. The doctrine or maxim *res ipsa loquitur* is not applicable to the facts of this case."

The mere proof that the trolley car of the defendant was crowded, in itself, is not proof of negligence. If the crowding of the car was the cause of the injuries to plaintiffs' decedent then the plaintiffs could not recover, because she voluntarily placed herself in such position, and this would manifest contributory negligence on her part.

> "The complaint charged the defendant that it propelled against the decedent an electric car at great speed, without giving any signal of the approach thereof, without using reasonable care to keep a lookout for the decedent, without using reasonable

care to illuminate the car and the road in front of the car."

It was held that a non-suit was not error.

Ryan v. *Public Service Railway Company,* 3 Adv. Reports 642, 128 Atl. Rep. 158, decided by this court, was a case in which suit was brought to recover damages under the death act. The plaintiff's intestate was killed on November 2, 1923, at a public highway crossing by being struck by an electric car of the defendant company, after which he died from his injuries. No one saw the occurrence. The court said,—

"There was no testimony offered from which the surrounding facts can be ascertained. There is proof only of one important fact, viz., the car hit the deceased. There is no proof of any facts from which negligence of the motorman of the trolley car may be inferred. It is elementary that negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. McCombe *v.* Public Service Ry. Co., 95 N. J. Law, 187, 112 A. 255. The trial resulted in a non-suit of the plaintiff. The judgment of non-suit should be affirmed. The ruling of the trial court is in harmony with our rulings in the cases of Alvino *v.* Public Service Ry. Co., 97 N. J. Law, 526, 117 A. 709, and Olsen *v.* Erie R. Co. (N. J. Err. & App.) 124 A. 367."

In the case of *Dwyer* v. *New York, L. E. & W. Ry. Co.,* 48 N. J. L. 373, 7 Atl. Rep. 417, this court said,—

"If a person, in leaving a ferry boat, voluntarily joins a crowd, which is so dense as to prevent him seeing where he treads,

> and voluntarily procceds with such crowd, and is injured by his foot being caught between the boat and the dock, such conduct, *per se,* manifests contributory negligence, and he should be non-suited."

In *Lehberger* v. *Public Service Ry. Co.,* 79 N. J. L. 134, our Supreme Court said,—

> "Plaintiff alleged in his declaration that he was a passenger on a street car operated by defendant, which car defendant permitted to become greatly overcrowded, so that plaintiff, when desiring to alight, had to push his way through the crowd; that while on the platform preparing to alight, and before the car stopped, he was so violently jostled by the crowd that he was pushed off and injured. He alleged that the accident was due to defendant's permitting the car to become crowded. Held, that the declaration failed to set out a cause of action."

The defendant contends that in the cases at bar there is no evidence that plaintiffs' decedent was a passenger on the car when the car was started in motion; that there is no evidence to justify the inference that decedent fell from the car because of any motion thereof caused by any negligent act of the defendant, and that the evidence justifies the inference that her fall may have been caused from some cause with which the defendant was unconnected. There being no presumption of negligence on the part of the defendant, verdicts should have been directed in its favor.

Ground No. 2 (p. 122)

Ground No. 4 (p. 126)

At the plaintiffs' request the court charged the jury (p. 106),—

> "1a. If a person is in the act of boarding a street car, standing in a public street for the receiving of passengers, it is negligence for those in control of the car to start it in motion without giving such person any notice of their intention to so start it."

An exception thereto (p. 112, l. 30) was taken by the attorney of the defendant.

The defendant contends that this instruction was erroneous and prejudicial to it; that its tendency was to confuse the jury. There is no evidence that decedent was in the act of boarding the defendant's car when it was started in motion, but, as a matter of fact, all through the many requests to charge presented by the plaintiff, in which, when charged, the same principle was reiterated time and time again, so that the jury must have been thereby led to the belief that the evidence warranted such an inference, when, as a matter of fact, it may well be that decedent attempted to board the car after it had been started in motion.

Our Supreme Court in the case of *Lambert* v. *Trenton & Mercer County Traction Corporation,* 3 Miscl. Rep. 227, 127 Atl. Rep. 674, said,—

> "In dealing with this appeal, we find it necessary to consider only one of the several grounds upon which we are asked to reverse the judgment under review, namely, the following instruction of the court to the jury:

"A pedestrian crossing a street is under no legal duty to anticipate any action by the chauffeur of a motor truck that would imperil her safety, and, having an equal right in the street, is not bound to look behind her, without a warning that it was intending to pass her on the left-hand side of the street. That is the law, and the same principles would apply in this case."

"This instruction was delivered in compliance with a request submitted by counsel of the plaintiff. That it had no relevance to the case which the jury was called upon to determine is apparent. That its tendency was to confuse the jury as to the real issue which the case presented is equally apparent. That the verdict of the jury may have resulted to some extent from their attempt to give effect in their finding to this erroneous instruction, we think, is equally clear; for it was their duty to be governed in their finding by the legal rules which the court instructed them were applicable to the case they were to consider. Where an erroneous principle of law is laid down by a trial court, a verdict which may have been the result of the erroneous instruction cannot be supported, and this, we think, is equally true where a principle of law, which has no bearing upon the issues involved in a litigation, is stated by the trial court to the jury as a rule which should govern them in their consideration of the cause.

"For the reasons stated the judgment under review will be reversed."

If it may be said that a person is in the act of boarding a street car when they are somewhere on a highway in proximity to a trolley

car, it might be contended that the operator of a trolley car, which came to a standstill for the purpose of accepting passengers should continue at a standstill perhaps so long as people continued to pass along on the sidewalk on a crowded thoroughfare, for someone walking along the sidewalk in the crowd might contemplate boarding that car. If people from a distance continue to come toward the car, how long must the operator keep his car at a standstill and obstruct the traffic of other cars, and other vehicles? The instruction failed to submit to the jury the question of defendant's negligence. There is no evidence to show where decedent was at the time the car was started. She may have been in Bamberger's store, and may have run out in the rain toward the car, intending to board it, after the conductor had given the signal for the car to start.

This court in the case of *Foley* v. *Brunswick Traction Company,* 66 N. J. L. 637, held,—

> "A passenger, in alighting from a street car at a temporary terminus selected by the defendant, stepped upon a stone in the highway and sustained injuries for which she brought suit. The jury was instructed that the plaintiff could recover damages if the place selected by the defendant for her to leave its car was not a safe one for that purpose. Held, that this instruction was erroneous, because it did not submit to the jury the question of the defendant's negligence, which was the gravamen of the action."

A person who attempts to board a trolley car while it is in motion, may, as a matter of law, be held negligent, yet when the fact that the car is in motion is the sole producing cause

of the injury, the risk of its occurrence is one which the person making the attempt must be held to have assumed.

In *Murphy* v. *North Jersey St. Ry. Co.*, 71 N. J. L. 5, our Supreme Court said,—

> "The allegation of the declaration is that while the defendant's car was standing at the station, the plaintiff attempted to get upon it; and that while he was in the act of boarding it the employes of the defendant company negligently and improperly started the car, thereby throwing the plaintiff to the ground. The plea was the general issue. The proof submitted by the plaintiff at the trial corresponded with the allegations of the declaration. The case made by the defendant was that its car had already started when the plaintiff approached it for the purpose of becoming a passenger on it; that, while it was in motion, he attempted to board it, missed his hold upon the grip and fell to the ground, thereby receiving the injuries for which he sues.
>
> "In his charge to the jury the trial judge, in commenting upon the case made by the defendant, instructed them that, even if they believed the accident to have occurred in the way testified to by the defendant's witnesses, they would, nevertheless, have a right to find a verdict for the plaintiff, if they concluded that the defendant was guilty of negligence.
>
> "This instruction was erroneous. In the first place, there was nothing in the operation of the car, if the testimony submitted on the part of the defendant was true, upon which the conclusion that it was negligent

could be rested. If the car was in motion when the plaintiff first evinced by his action an intention to take passage upon it, the mere fact that it continued to move while the plaintiff was making his attempt is not, of itself, any evidence of the defendant's negligence. Moreover, although it cannot be said, as a matter of law, that a person who attempts to board a trolley car while it is in motion is negligent, yet when the fact that the car is in motion is the sole producing cause of the injury, the risk of its occurrence is one which the person making the attempt must be held to have assumed.

"In the second place, it is a cardinal rule, for the control of a trial court, that only those questions which are within the issues raised by the pleadings should be submitted to the jury, and a failure to observe this rule is legal error. Excelsior Electric Co. *v.* Sweet, 30 Vroom 441. The issue presented by the pleadings for the determination of the jury in the present case was whether the defendant had caused the plaintiff's injury by negligently starting the car while he was in the act of getting upon it. This was the claim which was set up by the plaintiff in his declaration, and denied by the defendant in its plea, and which the plaintiff was bound to establish by proof in order to entitle him to a verdict. If, at the trial, he had abandoned this position, and attempted to show that his injury was due to an entirely different cause—for instance, the defective condition of the step upon the car—he, of course, would not have been permitted to do so, for it is elementary law that a plaintiff cannot

recover for a cause of action other than that set out in his declaration."

The mere fact that the door was allowed to remain open certainly cannot be held to be negligence *per se.*

Our Supreme Court in *Paginini* v. *North Jersey St. Ry. Co.,* 69 N. J. L. 62, said,—

"It cannot be said as a matter of law that it was negligence, *per se,* for the motorman to open the gate before the car came to a full stop, nor can it be said that the opening of a gate by a motorman while the car is moving is an invitation to a passenger to alight from a moving car. This would no more be true than would the act of a conductor in opening the rear door of the car as it was about to come to a street and stop be an invitation for a passenger to get up and step off the car by the rear platform while the car was still in motion. Passengers take obvious risks. Coleman *v.* Second Avenue Railroad Co., 114 N. Y. 609. Because a motorman opens a gate before a car comes to a stop, that will not excuse a person in jumping off a car before it comes to a stop. The mere opening of the gate will not raise a presumption of actionable negligence against the defendant company."

Grounds Nos. 3-4-5 & 6 (p. 123)

Grounds Nos. 5-6 (p. 126) 7-8 (p. 127)

The court charged the jury various requests of the plaintiff covered by these grounds pp. 107, 108, 109, 110, and exceptions thereto were taken (p. 112, l. 30). They are all subject to

the same objections argued by the defendant under Ground 2 (p. 122) and Ground 4 (p. 126), and without waiving its grounds of appeal it contends that the same argument applies to them all, and that by reason of erroneous charges the jury was led astray, and were undoubtedly confused. That there was no evidence to support the theory of the plaintiffs' claims as alleged in their complaints, and that such instructions were harmful error.

For all of the reasons set up in the grounds for appeal the defendant respectfully submits that the judgments in both actions should be reversed.

Respectfully submitted,

JOSEPH COULT,
Attorney for Defendant-Appellant.

WILLIAM H. SPEER and
HENRY H. FRYLING,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM P. RYAN, administrator *ad prosequendum* of M. E. Gertrude Ryan, deceased, *Plaintiff-Appellee,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*
WILLIAM P. RYAN, administrator of the estate of M. E. Gertrude Ryan, deceased, *Plaintiff-Appellee,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF OF PLAINTIFF-APPELLEE.

Due to the negligence of the defendant, M. E. Gertrude Ryan was injured on January 16, 1924, and, as a result thereof, died on June 12, 1924.

The action by the general administrator was brought to recover damages sustained in the interval between the injury and her death; and the action by the administrator *ad prosequendum* was brought to recover damages resulting from her death to her next of kin.

Both actions were tried together and the jury returned a verdict for the plaintiff in each case.

In the action by the general administrator, the defendant enumerates eight grounds of appeal;

while, in the other, it enumerates six. The eight include the six (but by different numbers) and, in addition, two others, which are numbered 1 and 3 and which apply to the action by the general administrator only.

These two grounds, involving the same question of law, are argued first by the defendant in its brief. Ground 2 in the action by the general administrator (numbered 1 in the action by the administrator *ad prosequendum*) is next argued. And thirdly, ground 4 in the action by the general administrator (numbered 2 in the action by the administrator *ad prosequendum*) is argued. The other grounds are not argued at length, defendant, in its brief, stating that they are all subject to the same objections argued under Ground 2 and Ground 4.

The order in which the various grounds of appeal are considered in defendant's brief, will be followed in this brief.

Grounds Nos. 1 and 3 (pp. 125-126).

Under these grounds, the whole contention of the defendant is that where death is the result of trespass, the recovery for injuries between the trespass and the death is limited, in cases like the present, to medical expenses and lost earnings; and that, therefore, the trial court improperly admitted the testimony as to the nature of the pain and suffering of decedent, and improperly charged the jury that the general administrator was entitled to recovery for such pain and suffering (Brief of Defendant-Appellant, p. 5).

To support this argument, defendant cites and quotes from the opinion of this Court delivered

by Justice Lloyd in the case of *Soden* v. *Trenton and Mercer County Traction Co.*, 127 Atl. Rep. 558, 3 Adv. Rep. 409. But, in that case, there was no claim of conscious pain or suffering or for damages therefor, nor is there anything in the quoted portion of the opinion to indicate that, had conscious pain and suffering been claimed, no recovery could have been had therefor.

On the other hand, the language of the whole opinion, instead of being stinted or negative in character, is broad and comprehensively liberal in its construction of the Act of March 17, 1855 (2 Comp. St. 1910, p. 2260, section 4), under which this action is brought. After reviewing the history of the legislation, this Court, at pages 559 and 560, says:

> "Viewing the subject historically, therefore, it would seem that but one conclusion could be reached. We have the old law, the mischief, and the remedy, and it is our duty to 'so construe the act as to suppress the mischief and advance the remedy.' Bl. Com. Bk. 1, page 87. That the old law fell short of meting out justice in the class of injuries of which the present is a type would seem to be beyond question. To hold that the damage to one's property should create liability surviving the death of its owner and to withhold the remedy where, under like circumstances, the injury is to one's person, is illogical, inconsistent, and an offense to our sense of justice. The additional words supplied in the act of 1855 are aptly used to enlarge the old law and to correct this injustice. It is impossible not to recognize a legislative purpose to complete the corrective process which had been in part attained in 1848, for it must not be overlooked that the act of 1855 followed in sequence the act of 1848 and not the reverse.
>
> Passing from the reasoning and spirit of the legislation on the subject we are no less

driven to the same conclusion when the act of 1855 is itself examined. Not only is the section under consideration clear, but a glance at section 5 will reveal a legislative purpose to remove effectively the bar of death in actions for wrongs inflicted in life. As the fourth section affords a full and complete remedy for tortious injuries to the person or property where death ensues, so the fifth section subjects the personal representatives of deceased persons to liability for unlawful injury perpetrated by those in whose place they stand. Under the latter section a right of action has been accorded even under the Death Act against the administrator of a deceased tort-feasor. Hackensack Trust Co., Adm'r, *v.* Vanden Berg, *et al.*, 88 N. J. Law 518, 97 A. 148.

The act as a whole has not been without judicial examination in our courts. Says Chief Justice Beasley in Ten Eyck *v.* Runk, 31 N. J. Law 428:

The 'act is highly remedial in its character. Its intent was to relieve against the harsh injustice of the old rule, "*actio personalis moritur cum persona.*" There was certainly nothing in morals, in public policy or in good sense to justify the continuance of a rule which grounded a man's right to recover for an injury to his person or estate, inflicted by a tortious act, on the contingency of the party injured surviving to the date of the judgment. The statute, therefore, is to be liberally construed so as to advance the remedy for this imperfection.'

In that case, which was for damage caused by negligently overflowing the plaintiff's land, the word 'trespass' in the act was given the widest application. The same liberal construction of the act was accorded in Tichenor *v.* Hayes, 41 N. J. Law 193, 32 Am. Rep. 186, and in Cooper *v.* Shore Electric Co., *supra.*"

Again, at page 560:

> "Whether, therefore, the act of 1855 be interpreted according to its own phraseology, in the light of the old law, the mischief, and the remedy, as one of liberal construction, or in view of the early expression of eminent jurists in this state and the decisions bearing upon section 5, there would seem to be no doubt that it was passed as supplementary to the Death Act, and to fill the gap left open in the acts of Edward III by affording complete and adequate redress to the estates of those who were injured in person or in property by injuries causing death, and likewise imposing liability on the estates of deceased persons for such wrongs to others."

The defendant, in its brief, attempts to misconstrue the statute by italicizing the word "their" before the word "damages," but it is obvious that executors and administrators, being merely personal representatives of the decedent, their damages can mean nothing more and nothing less than decedent's damages, which they may recover "in like manner as their testator or intestate would have had if he or she was living." The statute expressly states, "That executors and administrators may have an action for any trespass done to the person * * * of their testator or intestate against the trespasser or trespassers * * *"; and pain and suffering are certainly elements of damage in an action of trespass done to the person. Of course, the word "their" is not italicized in the statute; and there is nothing in the statute to indicate that pain and suffering, any more than any other element of damage, were to be excluded in computing the damages in the action of trespass authorized by it. To quote again from the first of the above-quoted portions of the opinion in the Soden case, it

was the "legislative purpose to remove effectively the bar of death in actions for wrongs inflicted in life." Consequently, the action of trespass to the person survived in its entirety, and, if any limitations or qualifications were intended by the legislature, they would have been stated in the statute.

Once it has been determined that the action is not abated by death (and it has been decided in the Soden case that an action like the present one is not abated), there can be no question as to the survival of any of its elements of damage. In other words, if the action has the quality of survivorship, it survives in its entirety.

The Supreme Court in the case of *Noice, admix.* v. *Brown,* 39 N. J. L. 569, and the Court of Errors and Appeals in the case of *Cooper* v. *Shore Electric Co.,* 63 N. J. L. 558; 44 Atl. Rep. 633, have indicated this as the proper rule.

In the Noice case (which was an action against the defendant, by the administratrix, for the seduction of her intestate's daughter, the intestate having been the husband of the plaintiff, and the alleged seduction having taken place in his lifetime), Justice Van Syckel, rendering the opinion of the court, at page 571, said:

> "The wrong is of a twofold character, wounding the person in his feelings, and affecting his property rights, resting, as it does, on the technical ground that, by the injury, he lost a service of some pecuniary value. The loss of the service would affect the estate in the hands of the personal representative, and should give equal support to an action by him. The damages being partly punitive, the action should survive, on the ground of public policy, that the punishment may fall on the wrong-doer.

> The case is within the language, and also within the spirit of the act."

In the Cooper case, *supra,* Justice Depue, rendering the opinion of the Court of Errors and Appeals, 63 N. J. L. at page 562, said:

> "The status of the mixim, '*Actio personalis moritur cum persona,*' in our judicial system, will be exemplified by comparing Hayden *v.* Vreeland, 37 N .J. Law, 372, with Noice *v.* Brown, 39 N. J. Law, 569. The opinion in each of these cases was delivered by Mr. Justice Van Syckel. In the first case it was held that an action for the breach of a promise of marriage could not, either at common law or within the act of 1855, be maintained by or against the personal representatives of either party to the contract, and was abated by the death of the defendant after issue joined. In the other case it was held that an action by a father for the seduction of his daughter in his lifetime might be maintained by his personal representatives. The decision in the first case was placed upon 'the exceptional nature of the contract, the injury being purely personal.' The learned judge, in his opinion, says: 'This action does not survive at common law, not because it is not an action *ex contractu,* as distinguished from tort, but for the reason that the injury is purely personal, in which the representative of the estate has no interest. * * * Its peculiarity lies in the fact that the injury to be compensated is exceptionally personal.' In the second case the action was sustained on the ground that the wrong was of a twofold nature—wounding the father in his feelings, and affecting his property rights—resting as it does on the technical ground that by the injury he lost service of some pecuniary value. The distinction between the two cases consists in that in the former the injury was purely personal, and in the latter the cause

> of action related to property rights, which gave to the suit the quality of survivorship, and took it out of the maxim, '*Actio personalis moritur cum persona.*' The force of these decisions, especially the last, will be apparent when the construction and effect of the act under which this suit was brought are considered."

If, in the Noice case, *supra,* recovery was allowed for wounded feelings and punitive damages, how much more, in cases like the present, should damages for pain and suffering be allowed.

In the case of *Hayden* v. *Vreeland,* 37 N. J. L. 372, cited by Justice Depue in the above quotation from the Cooper case, Justice Van Syckel, rendering the opinion of the Supreme Court to the effect that an action for breach of promise of marriage could not at common law be maintained by or against the personal representatives of either party to the contract and that, being an action *ex contractue* and not *in tort,* was, therefore, not within the act of March 17, 1855, and abated by death, said, at page 379:

> "Its peculiarity lies in the fact that the injury to be compensated is exceptionally personal, and hence, in a measure, the same rule of damages is applicable to an action to redress it that governs in other injuries of a strictly personal character. It cannot be saved by force of our statute of 1855, because it has been declared by our Supreme Court to be an action of contract, and therefore cannot be included by the most liberal interpretation of the word 'trespass.'
>
> In strict harmony with the view now adopted, the act of 1855 may be applied to that large class of cases in which defendants, acting under an implied contract to exercise skill and care, are guilty of negligence resulting in injury to the person

> only. In these cases there is a breach of an implied contract, but negligence is the gist of the action, and the declaration is framed *in tort*, to which the plea will be not guilty, so that there may be a recovery without an allegation of special damage to the estate."

In the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Craft*, 237 U. S. 648, the United States Supreme Court, in construing sections 1 and 9 of the Federal Employers' Liability Act, as amended, together, decided that the personal representative of a deceased employee is to recover, on the part of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of decedent while he lived.

See cases in other states cited in the Craft case, *supra*.

Ground No. 1 (p. 122).

Ground No. 2 (p. 126).

These two grounds are identical in language, being worded as follows:

> "Because the Court, at the close of the case, although requested so to do by the attorney of the defendant, refused to direct a verdict in favor of the defendant."

At the very outset it may be stated that, at the close of the cases, the evidence adduced in behalf of the plaintiff remained entirely uncontradicted, no evidence in behalf of the defendant, as to the happening, having been offered. The only witness called in behalf of defendant was a Mr. Carroll, who testified that he was employed in the claim department of the de-

fendant, that he had made an effort to locate the conductor of the car involved, that he had not been successful in locating him, but that he did not begin to make a search for the conductor until about a month before the trial (Case, pp. 94-97). There were no other witnesses sworn in behalf of defendant, nor was there offered in its behalf, in any form, the testimony of the conductor or of any of the numerous passengers on the car at the time of the happening.

The defendant, in its brief, under these grounds of appeal, discusses the testimony of some of plaintiff's witnesses and contends that there is no evidence that plaintiff's decedent was a passenger on the car when the car was started in motion; that there is no evidence to justify the inference that decedent fell from the car because of any motion thereof caused by any negligent act of the defendant, and that the evidence justifies the inference that her fall may have been caused from some cause with which the defendant was unconnected, and that the decedent was guilty of contributory negligence.

However, reference to the record of the trial discloses that all of the contentions of the defendant are groundless and unwarranted.

It was ~~amended~~ admitted at the trial that the decedent was employed at Bamberger's for sometime before and on the day she sustained her injuries (Case, pp. 20-21).

Harry W. Rowitz, sworn in behalf of the plaintiff, testified that he was employed as a stock clerk in Bamberger's and had been there for five years (Case, p. 24, ll. 32 to 35); that the accident happened at six o'clock in the evening; that it was a stormy night; the wind

was blowing really hard and raining also; pouring in fact; that he was standing in Bamberger's entrance, the first one from Washington street, on Market street, waiting to board a Kinney car that was going west, and when he saw a Kinney car coming and it came to a standstill in front of Bamberger's entrance, he ran out to approach the car, but there was a crowd trying to get on and they were moving very slowly; and he noticed the platform was crowded, and he started back for the entrance to Bamberger's with the idea of waiting for another car (Case, p. 25, ll. 1 to 23); that the crowd and not the car was moving very slowly (Case, p. 36, ll. 18 to 23); that he could not say the car was crowded at that time, because the back platform was crowded; that he could not say the inside was crowded; and that he could not see the inside of the car (Case, p. 32, ll. 1 to 10); that he did not get on the car because there was a crowd getting on it and because he did not have an umbrella (Case, p. 25, ll. 38 to 40); that the doors of the car were open as it came to a standstill (Case, p. 26, ll. 34 to 36); that when he reached Bamberger's entrance and turned around the car was going on its way and he saw Miss Ryan lying on the ground near the car tracks (Case, p. 26, ll. 8 to 16); that he went out to her (Case, p. 27, l. 23); that she was lying about one foot and a half or so from the car tracks (Case, p. 33, ll. 26 to 27); that her whole body was about at the place where the people had been getting on the car; and that the car, when he first saw her lying on the ground, was going about six feet or so (Case, p. 34, ll. 11 to 18); that she was unconscious (Case, p. 28, l. 20); that the marks or blood were on the back of her head (Case, p. 28, 11 24 to 25); that he went to the

City Hospital with her; that near the hospital he thought she became conscious for a moment or so because he heard her mention two words (Case, p. 29, ll. 22 to 27); that she was carried into the hospital (Case, p. 29, ll. 39-40) by the chauffeur and himself (Case, p. 30, ll. 1 to 2); that the blood was on his overcoat and his hands; that she bled quite freely, the blood coming pretty hard at the time he took her, running pretty freely from the back of her head (Case, p. 30, ll. 28 to 38); and that no conductor or motorman or anybody in uniform came back to help him pick up the girl (Case, p. 38, ll. 1 to 3).

Benjamin Friedman, sworn in behalf of the plaintiff, testified that in January, 1924, he was working at Bamberger's in the capacity of salesman; that he recalled the night of the accident to Miss Ryan; that he saw it; that it was very stormy and raining very hard and misty out; that it was somewhere around six o'clock; that he was right on the trolley when it happened; that he was on the step of the back platform; that the doors of the trolley were open; that he thought Miss Ryan was up ahead of him; that at that time the car was at a standstill (Case, p. 48); that Miss Ryan got on the step ahead of him; that he saw Miss Ryan injured; that he was on the step of the platform at the time; that before Miss Ryan was injured, she was right at his side, alongside of him, immediately next to him; that he distinctly recalled that the car started; that, in fact, they were all trying to shove in, both in front of him, and the people in back of him (Case, pp. 49-50); that the conductor was standing between the fare box and the steps; that he rode on the car all the way to his destination; down Washington

street past Branford Place; that after the car started and until it turned around on Washington street, he did not notice if there was any space in the interior of the car for passengers; but that he then noticed that there was plenty of room in the front of the car, the far end of the car; that the conductor did not give any warning at all (Case, p. 51) but rang the bell; that he saw him ring it and distinctly heard the bell; that the conductor raised his hand up and pulled on the bell-cord twice; that the minute he rang the bell the car went forward with a jerk; that as soon as the car started forward he saw Miss Ryan and the other girls on the step; that he was holding on to the platform and the other girls were trying to get a hold so they could stand on the platform with him, but while the car was moving one of the girls stepped off and stepped off safely on to the street and the other girl stepped off and fell in a sitting position (Case, p. 52); that Miss Ryan was at the rear and these girls were towards the front; that Miss Ryan was on his left and the two girls were on his right as he faced the car (Case, p. 59, ll. 10 to 14); that Miss Ryan slipped off, because the platform was slippery, because he had all he could do to stand there himself, and she slipped off and fell on the back of her skull—you could hear the sound; that Miss Ryan fell after the conductor rang the bell; that the doors were open when the conductor rang the bell and the people were on the step; that he spoke to the conductor as soon as he heard the sound of the fall but that the conductor did absolutely nothing; that he called the attention of the conductor to the fact that a girl had been thrown or had fallen off of his moving car (Case, p. 53); that the conductor did not make any reply and did not

close the door; that after that the car stopped in front of Miner's Theatre, on Washington street; that he was sure that was the first place, he then found himself and four other gentlemen on the platform, the other people who had been on the platform being inside in the car; that the conductor did not go back to the girl but the car then continued on its way (Case, p. 54); that he was one of the last who got on the car at Bamberger's (Case, p. 56, l. 40); that he could see the cap of the conductor and that he noticed the conductor's hand came up and got the bell cord (Case, p. 59, ll. 20 to 26); that he was watching to see if the conductor would shout some warning so they could close the door and that there were too many people to close the door (Case, p. 60, ll. 1 to 11); that the step was slippery because he had to hold on himself; that he saw Miss Ryan fall off; that she could not fall herself; that she must have slipped down, a person won't naturally fall off a trolley car themselves (Case, p. 61, ll. 33 to 40, and Case, p. 62, ll. 1 to 2); that he did not hear the conductor or anybody in charge of the trolley car give any warning that the car was about to start before the conductor rang the bell and that no warning was given (Case, p. 62, ll. 27 to 31).

James Elders, sworn in behalf of the plaintiff, testified that he was a chauffeur employed by the City of Newark, Department of Public Works; that on or about January 16, 1924, he was employed by the Mayor of the City of Newark, F. C. Breidenbach, that at about six o'clock of that evening he was right in front of Proctor's Theatre in a machine; that after he pulled up in front of Proctor's Theatre and was just going to get out to get some tickets,

he looked across the street and saw a form lying in the street; that his automobile was facing east, toward Broad street and that he was on the south side of the street; that after he saw the form lying on the street, he immediately swung his car around in the car tracks (Case, p. 91); that he then stopped the car and got out of it and helped this form into the car and it was a lady; that a young man helped him lift Miss Ryan into the car; getting in the back of the car with Miss Ryan; that at the time he swung around on Market street there was hardly anything on the street at all, outside of a couple of trolley cars going east on Market street; that he looked up and saw a Kinney car going towards Washington street; that this car was about crossing the lower section of Washington street just passing the corner (Case, p. 92); that after he got the woman in the car all he was thinking about was getting her to the hospital, but when he picked up the woman he looked ahead and saw the car with a crowd on the rear; that when he picked up Miss Ryan she was unconscious; that she must have been bleeding because there was blood in the car, after he took her out of the car and took her into the receiving room in the hospital (Case, p. 93).

The defendant, by its motion for a direction of a verdict, admitted the truth of the facts testified to by the witnesses called on behalf of the plaintiff and the truth of all legitimate inferences which might have been drawn from said facts in plaintiff's favor.

Fagan v. *Central Railroad Co.,* 94 N. J. L. 454, 111 Atl. 32;

Andre v. *Mertens,* 88 N. J. L. 626, 96 Atl. 893;

Sutton v. *Bell,* 79 N. J. L. 507, 77 Atl. 42.

In the case of *Fagan* v. *Central Railroad Co., supra,* one of the grounds of appeal was the refusal of the trial court to direct a verdict for the defendant.

Mr. Justice Trenchard, in rendering the opinion of the Court said:

> "The fact that it was also open to the jury to have found contrary conclusions as to the various matters of fact is immaterial, because in passing upon a motion for the direction of a verdict the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motion is made, and must give him the benefit of all legitimate inferences which may be drawn therefrom." Andre *v.* Mertens, 88 N. J. Law 626, 96 Atl. 893.
>
> "Where, as here, the existence of negligence depends upon the conclusion to be drawn from a variety and combination of circumstances considered in their relation to and their reaction upon each other, the jury, and not the court, is normally the tribunal to draw such conclusions."

Even if defendant, by its motion for a direction of a verdict, had not admitted the truth of the facts testified to by the witnesses called in behalf of the plaintiff (and the truth of all legitimate inferences which might have been drawn from said facts in plaintiff's favor), nevertheless, as has hereinbefore been pointed out in this brief, the facts testified to by the witnesses called in behalf of the plaintiff remained undisputed at the close of the trial, since no witnesses as to the facts were called in behalf of the defendant.

And the testimony of the witnesses called in behalf of the plaintiff—the only witnesses to the happening—unquestionably prove facts not

merely sufficient to raise the required questions for the jury but facts clearly establishing defendant's negligence, and without the slightest proof of any fact that might indicate any contributory negligence on the part of decedent.

The defendant's servants had brought its car to a stop on Market street at or near Washington street and had opened the doors at the rear end of said car for the purpose of receiving passengers thereon. While said car was so stopped and said doors opened, decedent became a passenger, boarding the car at its rear end and standing on the step of the rear platform. Although there was plenty of room in the front of the car, defendant's servants not only permitted the rear end to become and remain overcrowded, thereby impeding the progress of decedent toward the body of the car, but then and there started the car in motion without affording decedent an opportunity to reach a place of safety. This they could have done by ample and timely warning. But no warning whatever was given; and decedent had no chance to reach a place of safety either on the car or on the street before the car was started.

Decedent had a right to assume, and undoubtedly did assume, that defendant's servants, before starting the car, would afford her sufficient opportunity to reach a place of safety in the car, or, if there was no room in the car, that she would be warned of this fact and afforded an opportunity to get off the step safely before the car was started.

As a matter of fact, there was plenty of room in the front of the car; the duty of defendant's servants was clear; but defendant's servants, without giving any warning and with-

out providing any safeguards or making any provision for the safety of decedent and the three other persons on the slippery step with her, started the car as described, and, as a result, decedent was forced and thrown from the car to the pavement on Market street and mortally hurt.

The conduct of defendant's servants was not only negligent, but amounted to a reckless disregard of human life and safety; and, in this connection, the failure of the conductor to stop the car, when told of what had happened, and his subsequent disappearance, are significant.

In cases, involving far less aggravated circumstances, this Court has decided that there was sufficient evidence to go to the jury.

In the case of *Hansen* v. *North Jersey Street Railway Co.*, 64 N. J. L. 686, 46 Atl. Rep. 718, which was an action for personal injuries sustained by the plaintiff as a result of being pushed off the steps of a crowded trolley car of the defendant while she was in the act of alighting therefrom, the trial court directed a verdict for the defendant. This Court, in reversing the judgment, said:

> "A common carrier is negligent if it fails to take a high degree of care to protect its passengers from every danger that the exercise of reasonable foresight would anticipate. * * * Common carriers habitually transport persons of every degree of bodily health and vigor, including the young and the aged and infirm, of both sexes. That exit from a crowded car is likely to be attended in the case of any passenger with some difficulty, and in the case of a feeble person with some risk of injury, is a matter of daily observation and familiar experience. Reasonable foresight should anticipate

the possibility of such danger, and due caution should provide against it. The defendant was therefore bound specifically to use a high degree of care to protect the plaintiff—not, indeed, from crowding, *per se,* but from danger likely to arise from crowding. Consideration of public policy strengthens this conclusion. If common carriers are to be allowed to cram their cars with passengers, to their own profit and the discomfort of the public, they should be held all the more to a strict and active responsibility to use due care to secure safe entrances and exits. Otherwise, the obligation of a plain duty will be weakened by embarrassments of their own creation. It is important to consider in every such case whether the danger to the passenger was one that the common carrier should have foreseen.

* * * Common carriers are, from the exigencies of their business, peculiarly familiar with these difficulties and risks, and adopt regulations for dealing with them. The defendant seems to have had such a regulation. It was the custom that when a crowded car stopped at the junction both doors should be opened, so as to provide a double exit. The employees in charge of a trolley car are clothed with what has been called, not inappropriately, a 'police power for the protection of passengers.' The exercise of this power devolves in most cases upon the conductor. In this instance the motorman, by opening the front door and right-hand gate, and so inviting passengers to alight at his end of the car, became responsible for the good order of the persons who accepted that invitation, so far as a high degree of care on his part could secure it. * * * It is worthy of remark, as bearing on the motorman's attentiveness to his surroundings, that though a woman, and she a passenger who had just left the car, lay prostrate and seriously injured on the fender long enough for two persons

> to come from the sidewalk and extricate her, yet he, standing all the while on the front platform, knew nothing of this transaction until it was over. My conclusion is that there was evidence to go to the jury, not merely as to whether the plaintiff's account of her injury was accurate, but as to whether, if her account was accurate, the accident was such that it might have been prevented by the exercise of due care on the part of the defendant. If the jury could answer this latter question in the affirmative, they need look no further, for they might then infer negligence. In such a situation the burden shifts, and the common carrier, in order to exonerate himself, must show, if he can, that due care was exercised. * * * "

The case of *Consolidated Traction Co.* v. *Scott*, 58 N. J. L. 682, 34 Atl. Rep. 1094, decided by this Court on error to Supreme Court was an action by Virgina A. Scott, administratrix of her son, William Scott, for damages resulting from the death of her said son, a boy aged seven (7) years and eight (8) months, caused by being run over by a trolley car of the defendant below in the City of Bayonne.

The boy and his brother Horace were passing along the northerly side of Center street in said City in a westerly direction and were about to cross Avenue C, along which the defendant was engaged in running an electric street railway with double tracks. The general course of the railway was from north to south. As the boys neared the northerly crossing of Center street over Avenue C, a closed car, on its way to Jersey City, approached on the northbound track and stopped two or three feet north of the crossing for the purpose of receiving and discharging passengers. While the car was so standing there, receiving passengers, the boys,

with one other pedestrian, a Mr. McFale, had reached the crossing in the rear of the standing car. Mr. McFale and the larger boy stopped; but the smaller boy, who was one or two feet back of them, walked on to the southbound track where he was struck by a car from Jersey City and killed. Defendant moved that the plaintiff be non-suited on the ground that no negligence has been shown on the part of the defendant, and that contributory negligence had been proved on the part of the plaintiff's intestate. This motion the trial judge refused and his refusal was assigned as error by the defendant.

This Court, in affirming the judgment of the trial court, among other things, said:

> "* * * It is insisted in support of this assignment of error that the plaintiff below failed to establish any facts from which the jury would be justified in finding negligence on the part of the defendant. But this insistment is scarcely in accord with the well-settled rule regulating the action of the trial judge upon such a motion. It is not for him to say whether there are any facts proven in a given case from which the jury would be justified in finding negligence on the part of the defendant, but, rather, whether any facts have been established by evidence from which negligence might be reasonably inferred by a jury. As stated by Justice Magie in delivering the opinion of this court in Railway Co. *v.* Block, 55 N. J. Law 605, 27 Atl. 1067: 'In performing this function, the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury.' In applying this general rule to the exam-

> ination of the facts, it must be remembered that 'negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence.' ''

On the point that plaintiff's intestate was guilty of contributory negligence and that on that ground a non-suit should have been granted, this Court said:

> ''* * * The next ground of contention why the motion to non-suit should prevail was because of alleged contributory negligence on the part of the plaintiff's intestate. But, like the preceding ground, in order to give it the effect of requiring the court to arrest the trial and take the matter from the jury, the fault of the intestate must appear to be so clearly established by the evidence that there can be reasonably only one opinion on the subject.''

In the case of *Dwyer* v. *New York, L. E. & W. Ry. Co.,* 48 N. J. L. 373, 7 Atl. Rep. 417, cited by the defendant-appellant in its brief, this Court, reversing the judgment of the Supreme Court, among other things, said:

> ''* * * It does not necessarily follow that because a passenger voluntarily joins a crowd of persons when passing from a ferry-boat to the dock, that he thereby exhibits legal carelessness. Such is the habit of the most prudent travelers. The reason of such conduct is apparent. By so doing these persons do not deprive themselves of the use of any of their faculties which, under the circumstances, are necessary to their safety. They can see where they tread. * * *''

The principle that in the absence of direct evidence the plaintiff must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and exclude the idea that it was due to a cause with which the de-

fendant was unconnected, has no application in the present case.

In each of the cases cited by the defendant-appellant involving the above principle of law, no eyewitness, no direct evidence, was adduced. On the other hand, in the case of *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, 34 Atl. Rep. 1069, where a policeman was found upon a public street about three feet from the base of the electric light pole of the defendant, this Court held that there was sufficient circumstances proven from which the jury would be justified in inferring negligence, although there was no eyewitness or direct evidence as to the happening of the accident.

Ground No. 2 (p. 122).

Ground No. 4 (p. 126).

Under both of these grounds, defendant contends that plaintiff's request to charge No. 1a (Case, p. 114) was erroneous and prejudicial to defendant, in that its tendency was to confuse the jury. No objection or argument is advanced against the request as a correct statement of law, the purport of defendant's contention being that the principle of law stated has no relevancy to the case; that there was no evidence that decedent was in the act of boarding the defendant's car when it was started in motion, and that the tendency of the instruction was to confuse the jury.

The evidence on this point has already been amply discussed in this brief under the last preceding grounds, and it is unnecessary here to do more than refer to the discussion there of the testimony of the witness, Benjamin Friedman.

Not only is there evidence that decedent was in the act of boarding the defendant's car—that she was actually on the step of the rear platform (the means provided by defendant for boarding its car) on her way into the car—but there is absolutely no evidence that she was doing anything else.

She certainly was not getting off the car when it was started; and any question about her not being on the step at that time, in view of the absence of any contradicting evidence, must be taken as definitely settled by the testimony of Friedman, who swore that he was on the step of the back platform, that at that time the car was at a standstill (Case, p. 48), that Miss Ryan got on the step ahead of him, that before she was injured she was right at his side, that they were all trying to shove in, both in front of him and the people in back of him (Case, pp. 49-50), that the conductor did not give any warning at all (Case, p. 51), but rang the bell, that the minute he rang the bell the car went forward with a jerk, that as soon as the car started forward he saw Miss Ryan and the other girls on the step (Case, p. 52) that he saw Miss Ryan injured (Case, p. 49), and that she fell after the conductor rang the bell (Case, p. 53).

The attention of the Court is respectfully called to the charge to the jury as a whole, and to Section 27 of the Practice Act (1912), which is as follows:

> "No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party."

Even if, as contended by the defendant in its brief, there were no evidence to justify the request to charge complained of in the present case (which there certainly was) the rights of the defendant could not have been injuriously affected.

In the case of *Connolly* v. *Public Service Railway Co.*, 94 N. J. L. 157, 109 Atl. Rep. 507, this Court, Justice Parker, rendering the opinion, said:

> "* * * The judge gave instructions with respect to the general duty of care to be exercised by the motorman of a street car which, as a matter of common law, are unexceptionable, and the question is whether this judgment should be reversed because of his statement to the jury that there was no speed limit for trolley cars, etc. In determining this question, it should be borne in mind that the judge was speaking to a particular case; that section 27 of the Practice Act of 1912 provides that:
>
> 'No judgment shall be reversed * * * on the ground of misdirection, * * * unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.' P. L. 1912, p. 382.
>
> "We are unable to say that this error injuriously affected the rights of the plaintiff. There is nothing in the case before us to show that the trolley car was moving at any speed in excess of the statutory rate, and if there were no such evidence it was quite immaterial whether the judge erroneously instructed the jury with respect to the statute or not. No case, therefore, is made for a reversal on this ground."

Grounds Nos. 3-4-5 & 6 (p. 123).

Grounds Nos. 5-6 (p. 126); 7-8 (p. 127).

Regarding these grounds and the requests to charge covered by them, defendant merely states that they are subject to the same objections argued by the defendant in its brief under Ground 2 and Ground 4, and that the same argument applies to them all. It is, therefore, in this brief, as to these grounds, unnecessary to do more than respectfully refer the Court to the arguments in this brief under Grounds 2 and 4 and request that they be applied in considering these grounds.

While the grounds of the defendant's objections to all of the requests complained of, are merely as to their alleged lack of application to the facts or alleged absence of facts, the correctness of all of said requests, in point of law, is substantiated by the following cases:

David v. *Camden,* 73 N. J. L. 415, 63 Atl. Rep. 843;

Hansen v. *North Jersey Railway Co.,* 64 N. J. L. 686;

Trusell v. *Morris County Traction Co.,* 79 N. J. L. 533;

Tuttle v. *Atlantic City Railroad,* 66 N. J. L. 327;

Collins v. *New Jersey Express Co.,* 72 N. J. L. 231.

* * * * * * *

It is, therefore, in view of all of the facts hereinbefore stated in this case and in view of the rules of law applicable to the same, respectfully submitted that the judgment below should not be reversed, but that the appeal should be dismissed.

GROSKEN & MORIARTY,
Attorneys and Counsel with
Plaintiffs-Appellees.